



# **Orleans Criminal District Court, Magistrate Court & Municipal Court:**

## ***2018 Review***

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## I. EXECUTIVE SUMMARY

Court Watch NOLA (CWN) is a non-profit organization with the mission of promoting reform in the Orleans Parish criminal court system through civic engagement and courtroom observation. This report encompasses the data collected and the observations made by 113 CWN volunteers from January 1, 2018 to December 31, 2018 in Criminal District, Magistrate, and Municipal Courts with a total of 810 court settings observed. This report explores the topics of conflicts of interest, victim rights, bail, right to counsel, fines and fees, criminal contempt, pre-trial drug testing and efficiency in the Orleans Parish criminal courts and the larger criminal justice system during 2018.

### **Judicial Ethics--Campaign Financing**

The Code of Judicial Conduct teaches judges that, in order for the community to retain confidence in them, the judge must not only be independent and honest, but just as importantly, the judge must be believed by all to be independent and honest.<sup>1</sup> In examining campaign contributions from 2008-2018, CWN found that Judge Paul Bonin received a \$1,000 campaign loan from ETOH Monitoring, LLC ("ETOH") executives in his successful 2016 election<sup>2</sup> and at least \$8,150 in campaign financing from ETOH monitoring executives over the last ten years.<sup>3</sup> Judge Bonin was found to have steered defendants to the ETOH for ankle monitoring in 23 cases. On several occasions, Judge Bonin refused to release the defendants from jail until the defendant's family had arranged for ETOH to establish ankle monitoring services.<sup>4</sup> On several other occasions, Judge Bonin refused to release criminal defendants from their ankle monitors until the defendant paid ETOH all remaining fees the defendant owed to ETOH. In at least two cases, Judge Bonin threatened to incarcerate the defendant for failing to pay ETOH. In 2018, ETOH's ankle monitoring cost approximately \$10 a day, and Judge Bonin often required criminal defendants to wear ankle monitors for months.

- **Recommendation 1:** Judges should avoid conflicts of interest that reflect adversely on the judge's impartiality, interfere with the proper performance of the judge's duties, or exploit the judge's judicial position. Judges should not accept campaign funds and loans that might reasonably appear as influencing the judge's official conduct or undermining the judge's independence, integrity, or impartiality. Where it is impossible for a judge to avoid a conflict of interest, it is incumbent upon the judge to disclose the conflict of interest to the relevant parties to avoid the impression of impropriety.

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<sup>1</sup> See Leslie Abramson, Canon 2 of the Code of Jud. Conduct, 79 Marq. L. Rev. 962 (1996).

<sup>2</sup> La. Ethics Admin. Program, La. Campaign Fin. Rep. No. 59725 for Paul Bonin (8/10/16).

<sup>3</sup> La. Ethics Admin. Program, La. Campaign Fin. Rep. No. 61852 for Paul Bonin (1/19/17); La. Ethics Admin. Program, La. Campaign Fin. Rep. No. 60688 for Paul Bonin (11/4/16); La. Ethics Admin. Program, La. Campaign Fin. Rep. No. 35430 for Paul Bonin (2/15/13); La. Ethics Admin. Program, La. Campaign Fin. Rep. No. 32109 for Paul Bonin (8/8/12); La. Ethics Admin. Program, La. Campaign Fin. Rep. No. 804529 for Paul Bonin (10/4/08).

<sup>4</sup> Court Transcript transcribed by Stenographer Eve Kazik, Criminal District Court Section D., Case No. 542162, (Oct. 24, 2012).

### **Judicial Ethics--One-Party Sidebars**

From 2016 until present, CWN has tracked one-party sidebars, the discussion between the judge and either the defense or the prosecution without the opposing party present, conducted at the bench or in judicial chambers, and outside the earshot of the public. According to the Judicial Canons, a judge shall not permit private or ex parte interviews, arguments, or communications designed to influence their judicial action in any case.<sup>5</sup> These ex parte sidebars often occur during one-party sidebars. In fact, one the best way we have to reduce back-room dealings between the powerful players of our system and judges is by reducing the ex parte meetings that are evidenced in one-party sidebars.

- **Recommendation 2:** Where a one-party sidebar is absolutely necessary for administrative reasons, judges should announce to the public that the facts of a case are not being discussed or that the matter being discussed is purely administrative. Judges should attempt to discontinue the practice of one-party sidebars, since it gives a public impression that undermines confidence in the judge's independence, integrity, and impartiality.

### **Judicial Ethics--Intolerance and Prejudice**

Canon 3 of the Code of Judicial Conduct states in part, "A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, and shall not permit staff, court officials or others subject to the judge's direction and control to do so."<sup>6</sup> In 2018, CWN volunteers observed 16 incidents in Magistrate Court, 11 incidents in Criminal District Court, and one incident in Municipal Court where the CWN volunteer perceived someone in the court "was treated inappropriately or differently based on gender, race, ethnicity, religion, age, disability status, sexual orientation, or economic status," with racial prejudice being the most common type of perceived discrimination. Permitting a public official to openly engage in discrimination encourages the public to believe that discriminatory attitudes, statements, and actions are acceptable, normal, and thus can be emulated and even escalated.<sup>7</sup>

- **Recommendation 3:** Judges should refrain from any action or statement that could give the impression of bias against a defendant or other individual in their courtroom based on gender, race, ethnicity, religion, age, disability status, sexual orientation, or economic status. Judges have the responsibility of ensuring that prejudice and bias is not tolerated by the lawyers and court staff in the judge's courtroom.

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<sup>5</sup> La. Code Jud. Con. § 3(A)(6) (2019).

<sup>6</sup> La. Code Jud. Con. § 3 (2019).

<sup>7</sup> Brian Levin & John David Reitzel, Cal. State University, San Bernadino Ctr. for the Study of Hate & Extremism, Rep. to the Nation: Hate Crimes Rise in the U.S. Cities and Counties in Time of Division & Foreign Interference (May 2018), [https://csbs.csusb.edu/sites/csusb\\_csbs/files/2018%20Hate%20Final%20Report%205-14.pdf](https://csbs.csusb.edu/sites/csusb_csbs/files/2018%20Hate%20Final%20Report%205-14.pdf). See also Anti-Defamation League, <https://www.adl.org/education/resources/tools-and-strategies/pyramid-of-hate-en-espanol> (last visited Mar. 9, 2019).

### **Victim Rights--Victims in Magistrate Court**

Since March 2018, assistant district attorneys no longer appear for 14 out of 19 Magistrate Court settings. That means there is no assistant district attorney making bail arguments, speaking on the victim's behalf, or speaking to victims in Magistrate Court in more than ¾ of Magistrate Court settings. Often, crime victims have pivotal information about the defendant's likelihood of returning to court and likelihood of committing new crimes upon pre-trial release.<sup>8</sup> Without the prosecutor in Magistrate Court, the victim has lost a pivotal opportunity to transmit whether the defendant poses a danger to them or anyone else in the larger community.

- **Recommendation 4:** The Orleans Parish District Attorney's Office should regularly attend and take part in all first appearance hearings in Magistrate Court. When crime victims have information that relates to the defendant's pre-trial release, the prosecutor should ensure that such information is transmitted to the Magistrate or Commissioner who is determining pre-trial release.

### **Victim Rights--Untreated Victim Trauma**

Experts in the victim advocacy field have concluded that a more effective response to victim trauma will reduce repeat victimization and future offending.<sup>9</sup> Crime victims with untreated trauma can exhibit aggressive, retaliatory behaviors and/or engage in illicit substance use, all leading to increased rates of arrest.<sup>10</sup> When CWN volunteers were asked to record the number of Magistrate Court cases where the defendant could also potentially be considered the victim of a crime, CWN volunteers found that in 77% of cases, the defendant may have been defending himself or herself from another individual.<sup>11</sup> Despite the well-documented correlation between chronic exposure to trauma and an increased rate of arrest,<sup>12</sup> the Louisiana Crime Victim Reparation Board is currently prohibited from providing resources to any non-sex crime victim who has been convicted of a felony in the last three years before becoming a crime victim, or any crime victim who is currently on probation or parole.<sup>13</sup> Louisiana House Bill 85 would eliminate the

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<sup>8</sup> Int'l Ass'n of Chiefs of Police Victim Services Comm., Law Enforcement's Role in Supporting Victims' Needs Through pre-trial Just. Reform (June 2015), <https://www.theiacp.org/sites/default/files/2018-08/SupportingVictimsThroughpre-trialReform.pdf> ("If the standard procedure for determining pre-trial release is consistently informed by the results of a risk assessment and testimony provided by the victim(s), as opposed to a static bond schedule, better informed decisions can be reached. Institutionalizing this practice also helps meet the need of victims to be heard throughout the justice process").

<sup>9</sup> Jeremy Travis, Summoning the Superheroes: Harnessing Sci. & Passion to Create a More Effective & Humane Response to Crime: 25th Anniversary Keynote Address, in *The Sentencing Project, To Build a Better Crim. Just. Sys.: 25 Experts Envision the Next 25 Years of Reform*, 5-13 (Marc Mauer & Kate Epstein eds., 2012), available at <http://www.sentencingproject.org/wp-content/uploads/2016/01/To-Build-a-Better-Criminal-Justice-System.pdf>.

<sup>10</sup> Lena Jäggi et al., *The Relationship Between Trauma, Arrest, and Incarceration History Among Black Ams.: Findings from the Nat'l Survey of Am. Life, 6 Society and Mental Health* 187-206 (2016).

<sup>11</sup> N = 26 observations of Magistrate Court.

<sup>12</sup> Deborah Prothrow-Stith, *The Promise of Prevention: Public Health as a Model for Effective Change*, in *The Sentencing Project, To Build a Better Criminal Justice System: 25 Experts Envision the Next 25 Years of Reform*, 28-29 (Marc Mauer & Kate Epstein eds., 2012), available at <http://www.sentencingproject.org/wp-content/uploads/2016/01/To-Build-a-Better-Criminal-Justice-System.pdf>.

<sup>13</sup> Alysia Santo, *For Black Crime Victims with Criminal Records, State Help is Hard to Come by*, *The Marshall Project & Reveal from the Ctr. for Investigative Reporting*, U.S.A. Today, Sept. 13, 2018, available at <https://www.usatoday.com/story/news/nation/2018/09/13/crime-victim-compensation-funds-blacks/1218283002/>.

prohibition against providing resources to crime victims and their families who have been convicted of a crime or who are currently on probation or parole.<sup>14</sup>

- **Recommendation 5:** State political leaders and the community at large should support Louisiana House Bill 85 and eliminate the discriminatory prohibition against crime victims receiving crime victim compensation when such victims have a criminal conviction or are on probation or parole.

### **Victim Rights--The Traumatized Victim and Testimony in Court**

The majority of crime victims do not report the crime they are victimized by, and many others decide not to proceed with criminal charges after reporting.<sup>15</sup> In Louisiana, crime victims and witnesses who are under 17 years of age or who are developmentally disabled can testify in another room outside of the court and be simultaneously televised by closed-circuit television to the court and jury.<sup>16</sup> There is nothing in either federal or Louisiana State Law that limits the ability of an equally-traumatized adult victim or witness from being able to testify via closed-circuit television if an important public policy requirement is present and the defendant is unable to reliably testify without a closed-circuit television.<sup>17</sup> CWN volunteers tracked the number of times a fragile victim or witness either testified or was asked to testify in criminal court. Out of a total of seven observations, CWN volunteers indicated that no Judge offered a confidential space (i.e., not the public courtroom) where the victim or witness could testify. Fragile victims or witnesses observed by CWN volunteers included three victims of non-sexual offenses, two survivors of sex crimes, and two witnesses with mental or emotional disabilities.

- **Recommendation 6:** The Louisiana State Legislature should consider amending Louisiana Statutes § 15:283 to allow an adult victim or witness to testify via simultaneous televised testimony (1) if expert testimony shows the victim or witness would likely suffer serious emotional distress, and (2) without such simultaneous televised testimony, the victim or witness could not reasonably communicate their testimony to the court or to the jury. Where possible, the Orleans Parish District Attorney should consider making a motion requesting such a traumatized adult victim or witness be able to testify via closed-circuit television if expert testimony establishes that trauma had such a debilitating effect on the victim or witness and the reliability of the victim or witness' testimony is otherwise assured.

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<sup>14</sup> H.B. 85, 2019 H. Legis. Servs., Reg. Sess. (La. 2019), available at <http://www.legis.la.gov/Legis/ViewDocument.aspx?d=1116146>.

<sup>15</sup> Judith Lewis Herman, The Mental Health of Crime Victims: Impact of Legal Intervention, 16 Journal of Traumatic Stress 159-166 (2003), available at <https://onlinelibrary.wiley.com/doi/epdf/10.1023/A%3A1022847223135>.

<sup>16</sup> La. Stat. Ann. § 15:283(A)(1)(2).

<sup>17</sup> Meg Garvin, et al., Allowing Adult Sexual Assault Victims to Testify at Trial via Live Video Tech., in Nat'l Crime Victim Law Inst. Viol. Against Women Bulletin, 1 (2011), available at [law.lclark.edu/live/files/11775-allowing-adult-sexual-assault-victims-to-testify](http://law.lclark.edu/live/files/11775-allowing-adult-sexual-assault-victims-to-testify). See also Natalie Montell, A New Test for Two-Way Video Testimony: Bringing Maryland v. Craig into the Technological Era, 50 U. Louisville L. Rev. 361, 373 (2012).

### **Bail, Fines and Fees--The Return on Indictment Process**

After the grand jury returns a “true bill” and a felony case is brought to Criminal District Court for the first time, for at least 10 years if not longer<sup>18</sup> it has been the practice of the District Attorney's Office to argue for a bail increase without notifying the defense, without the defense attorney present, without the defendant present, and without a written motion. The average bail amount increased by 577% between Magistrate Court and Criminal District Court, from an average of \$165,103 in Magistrate Court to an average of \$1,117,472 after the true bill indictment was filed in Criminal District Court (the return on indictment). This amount decreased by only 6%, or an average of \$64,037, after the defense attorney had an opportunity to reargue bail, ultimately averaging \$1,053,435. Sometimes criminal defendants who had already paid their bail were rearrested in criminal court without notice, even though they had followed all the conditioned requirements of their bail bond release. Constitutional law requires the defense attorney to be present when bail is argued at a return on indictment. The defendant himself or herself should also be present in court for this proceeding if the prosecution chooses to argue for a bail increase.

- **Recommendation 7:** The defendant and the defense attorney must be notified and produced, respectively, for any bail argument; a bail argument should not be an ex parte proceeding. When a defendant is “charged at large,” they should be arrested and brought to the arraignment proceeding where bail can be set if needed. Judges should not entertain a bail argument without the defendant and the defense attorney present; the defendant's presence can only be waived for the bail argument by their attorney or by the defendant's voluntary failure to appear.
- **Commendation 1:** CWN commends Chief Judge Keva Landrum-Johnson for ensuring constitutional rights are upheld in her court during the return on indictment process. She has been courageous in prohibiting an unsound practice from continuing in her courtroom, persuasive toward others on the bench to abide by the Constitution, and transparent with the public.

### **Bail, Fines and Fees--Municipal Court Compliance with the 2017 Municipal Bail Reform Law**

In January 2017, New Orleans City Council passed comprehensive bail reform for all municipal (city) offenses. The municipal bail reform statute requires that a defendant charged only with municipal offenses and having no warrants<sup>19</sup> or additional pending cases be released on their own recognizance (with no bail)<sup>20</sup> unless the defendant is charged with municipal battery, assault, illegal carrying of a weapon, impersonating a peace officer, or domestic violence.<sup>21</sup> CWN is pleased to report that of the 109 Municipal Court cases it reviewed, Municipal Court judges complied with the Municipal Code Ordinances in all cases. In all cases in the CWN sample, in

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<sup>18</sup> Telephone Interview between Simone Levine and Defense Attorney Gary Wainright. (May 2, 2019); Telephone Interview with Derwyn Bunton, Chief Dist. Defender, Orleans Pub. Defenders (Apr. 29, 2019).

<sup>19</sup> New Orleans Mun. Code § 54-23 (2019).

<sup>20</sup> New Orleans Mun. Code § 54-23(c) (2019).

<sup>21</sup> New Orleans Mun. Code § 54-23(d) (2019).



which defendants were eligible to be released on their own recognizance ("ROR") under the municipal bail reform statute, defendants in only 8 cases were ordered to pay bail without an ROR. These eight cases all fell within the Municipal Bail Ordinance exceptions.

### **Bail, Fines and Fees--Drug Test Fees**

Many observers have concluded that a user-pay system, in which criminal defendants are required to pay court fines and fees to financially maintain the court system, poses more problems than it offers solutions.<sup>22</sup> Drug tests for Orleans Parish-based defendants cost \$10 each, whereas drug tests for out-of-town individuals cost \$25 each.<sup>23</sup> The amount that criminal defendants paid for drug testing in Orleans Parish in 2018 totaled \$74,233.<sup>24</sup> However, the cost of the drug testing facility inside the court was \$350,126, and the cost of the collections department staffing was \$133,996.80.<sup>25</sup> Increasingly, experts have started to push judges to question whether drug testing that would initially cost indigent users, but would later, when the indigent court users are unable to pay, cost taxpayers--are in fact worth the cost.<sup>26</sup> One of the main questions a judge should ask is what the court's larger objective behind its requirement for drug testing a defendant.<sup>27</sup> This is especially true when the criminal case for which the defendant is charged neither relates to drugs, nor is there solid evidence of the defendant's drug abuse.<sup>28</sup>

### **Incarceration as Punishment--Contempt for Failure to Hire a Private Attorney**

A judge has the power to fine or imprison a person for contempt of court if, broadly speaking, the individual does not comply with the court's lawful order.<sup>29</sup> The United States Supreme Court (U.S. Supreme Court) has warned of the potential for abuse in using imprisonment as a sanction for contempt, citing it as an "arbitrary" power which is "liable to abuse," and warning that "care is needed to avoid arbitrary or oppressive conclusions."<sup>30</sup> Additionally, research on procedural fairness, which is an evidence-based practice endorsed by the American Judges Association, National Center for State Courts, Conference of Chief Justices, and Conference of State Court Administrators,<sup>31</sup> has shown that when the public has a positive perception of courtroom

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<sup>22</sup> Joseph Shapiro, All Things Considered: As Court Fees Rise, The Poor Are Paying the Price, Nat'l Public Radio (May 19, 2014), available at <https://www.npr.org/2014/05/19/312158516/increasing-court-fees-punish-the-poor> ("A yearlong NPR investigation found that the costs of the criminal justice system in the United States are paid increasingly by the defendants and offenders. It's a practice that causes the poor to face harsher treatment than others who commit identical crimes and can afford to pay. Some judges and politicians fear the trend has gone too far").

<sup>23</sup> Orleans Criminal District Ct, Drug Testing, <http://www.criminalcourt.org/drug-testing.html> (last visited May 1, 2019).

<sup>24</sup> Response to Public Records Request from Robert Kazik, Orleans Criminal District Ct. Judicial Adm'r, to Veronica Bard, CWN Deputy Director (Feb. 19, 2019) (on file with CWN).

<sup>25</sup> Interview with Robert Kazik, Jud. Adm'r, Orleans Parish Crim. Dist. Ct. (Apr. 15, 2019). The Collections Department is required to collect all court fines and fees, not just drug test fees.

<sup>26</sup> Jessica Brand, How Fines and Fees Criminalize Poverty: Explained, The Appeal, Jul. 16, 2018, available at <https://theappeal.org/fines-and-fees-explained-bf4e05d188bf/>.

<sup>27</sup> Telephone Interview with Lisa Foster, Co-Director, Fines and Fees Justice Ctr. (Apr. 16, 2019).

<sup>28</sup> *Id.*

<sup>29</sup> La. Code Crim. Pro. § 17.

<sup>30</sup> *Bloom v. Illinois*, 391 U.S. 194, 202 (1968).

<sup>31</sup> See Susanne Beier, et al., Influence of Judges' Behavior on Perceived Procedural Justice, 44 J. of Applied Social Psychology 57 (2014) (neutral observers may be better suited to making procedural fairness judgments than defendants themselves because they may have "a more objective perception of the [defendant's] actual treatment."). Utah and



procedure as fair, neutral, and respectful, it results in reduced recidivism and increased compliance with court orders.<sup>32</sup>

CWN examined cases in which a defendant was held in contempt for failing to hire a private defense attorney. In one example, Judge Paul Bonin originally remanded the defendant (so that there was no bail the defendant could pay to be released) for 9 days until Judge Bonin changed the order to allow the defendant to pay bail, and they were finally released after 4 days in jail. In the second example found by CWN, Judge Darryl Derbigny sentenced a defendant to 25 hours of community service for contempt in failing to hire a private defense attorney even though the defendant had previously been appointed a public defender on an earlier and still open pending case.

- **Recommendation 8:** Courts should hold a defendant in contempt for failure to hire a private defense attorney only if there is proof beyond a reasonable doubt that the defendant willfully disobeyed the court's order to hire a private defense attorney. Additionally, courts should carefully determine a defendant's ability to pay for a private attorney before ordering them to do so. In addition to providing legal due process, it is important for judges to meet the public's expectations that courtroom procedure be fair, neutral, and respectful.

#### **Incarceration as Punishment--Contempt for a Defendant's Positive Drug Screen**

Orleans Criminal District Court judges may be punishing defendants for non-definitive drug test results. While the Drug Testing Lab on the first floor of the Orleans Criminal District Courthouse is capable of running initial drug screens, which produce presumptive results,<sup>33</sup> scientific best practices require a secondary confirmatory test for the most accurate results.<sup>34</sup> The Drug Testing Lab lacks the technology for this definitive confirmatory test,<sup>35</sup> yet Criminal District Court judges are incarcerating, fining, and ordering community service for defendants who have presumptively positive drug test results. Despite the problems with the lab analysis, at least 77 pre-trial defendants were held in contempt for purportedly positive drug tests in 2018, with 59 pre-trial defendants serving an average of 18 days in jail, including two pre-trial defendants who were held in contempt of court in 2018 for positive drug screens for marijuana alone and jailed an average of 19 days.<sup>36</sup>

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Alaska, two leaders in the procedural fairness movement, also use citizen observers to rate Judges as part of the two states' official judicial performance evaluations. Hon. Steve Leben, The Procedural-Fairness Movement Comes of Age, Nat'l Ctr. for State Cts., Trends in State Cts. 60-61 (2014).

<sup>32</sup> Resol. 12, Conf. of Chief JJs./Conf. of State Ct. Adm'rs, Access, Fairness and Pub. Trust Comm. (Jul. 31, 2013), <http://ccj.ncsc.org/~media/Microsites/Files/CCJ/Resolutions/07312013-Support-State-Supreme-Court-Leadership-Promote-Procedural-Fairness-CCJCOSCA.ashx>.

<sup>33</sup> Agreement for Services Between DCI and New Orleans Criminal Ct. (June 8-9, 2019) (on file with CWN).

<sup>34</sup> Margaret Jarvis, et al., Consensus Statement: Appropriate Use of Drug Testing in Clinical Addiction Med., 11 J. of Addiction Med. 163-73 (2017).

<sup>35</sup> See Response to Public Records Request from Robert Kazik, Orleans Criminal District Ct. Judicial Adm'r, to Veronica Bard, CWN Deputy Director (Feb. 21, 2019) (on file with CWN).

<sup>36</sup> Sources: Orleans Parish Sheriff's Office Docket Master & Orleans Criminal District Court Clerk's Office.

- **Recommendation 9:** Judges should not sanction defendants without proper testing that follows scientific best practices. The Drug Testing Lab should research available definitive confirmation testing options. Once the Lab has a scientifically accepted procedure in place, the Lab should execute its procedures consistently in every case. Judges should carefully consider their objectives for ordering each drug test and question whether a drug test required of a specific defendant at that specific moment will help achieve those judicial objectives.

### **Incarceration as Punishment--Use of the Habitual Offender Laws**

Louisiana's habitual offender law requires judges to increase mandatory minimum sentences for criminal defendants who have previously been convicted of felony offenses when judges are requested to do so by the prosecution.<sup>37</sup> From January 2009 until 2017, the Orleans Parish District Attorney used the habitual offender law in sentencing more often than any other Louisiana Parish.<sup>38</sup> However, with recent changes made to state law relating to the sentencing of habitual offenders, the Orleans Parish District Attorney's Office has used the habitual offender law in sentencing less than it had before.<sup>39</sup> CWN also found a slight decrease in the rate of defendants who pleaded guilty after someone had referred to them as a habitual offender from 16% in 2017 to 13% in 2018.<sup>40</sup>

### **Incarceration as Punishment--New Orleans's New Municipal Marijuana Laws**

In March 2016, Mayor Landrieu signed an ordinance passed by the City Council that allowed the New Orleans Police Department to issue a summons instead of making an arrest in certain marijuana cases and to require a fine instead of jail time.<sup>41</sup> While several websites, particularly tourist or marijuana enthusiast websites, tout the change in the law as "decriminalization,"<sup>42</sup> marijuana remains very much illegal in New Orleans, and it is essential that the public be educated as to the current status of the law. Currently there are more than 25 different exceptions that would allow for arrest instead of a municipal summons on a marijuana possession case. That being said, in 2018, NOPD issued a summons in 85% of the 2,871 total incidents involving marijuana possession.<sup>43</sup>

<sup>37</sup> La. Stat. Ann. § 15:529.1.

<sup>38</sup> Reveal: 10 Years or Life, Ctr. for Investigative Reporting (Oct. 6, 2018), available at <https://www.revealnews.org/episodes/10-years-or-life>.

<sup>39</sup> Eve Abrams, Habitual Offender Prosecutions down in New Orleans, The Lens, Nov. 29, 2018, available at <https://thelensnola.org/2018/11/29/habitual-offender-prosecutions-down-in-new-orleans/>; Matt Sledge & John Simerman, New Orleans DA, Criminal Court and Cops Make Budget Pitches to Council, New Orleans Advocate, Nov. 13, 2018, available at [https://www.theadvocate.com/new\\_orleans/news/courts/article\\_ed110fa0-e78e-11e8-839d-af0f2a46754f.html](https://www.theadvocate.com/new_orleans/news/courts/article_ed110fa0-e78e-11e8-839d-af0f2a46754f.html).

<sup>40</sup> N = 456 (2017), 487 (2018) Criminal District Court observations.

<sup>41</sup> Kevin Litten, NOPD Marijuana Arrests Plunged to 1 Percent After Ordinance Change, Nola.com, Mar. 28, 2018, available at [https://www.nola.com/politics/2018/03/marijuana\\_ordinance\\_new\\_orlean.html](https://www.nola.com/politics/2018/03/marijuana_ordinance_new_orlean.html).

<sup>42</sup> Marijuana Policy Project, La. Med. Marijuana Program Still not Functioning, <https://www.mpp.org/states/louisiana/> (last visited Mar. 1, 2019). See also Kush Tourism, Is Weed Legal in La.? La. Marijuana Laws, <https://kush tourism.com/louisiana-marijuana-information/> (last visited May 1, 2019).

<sup>43</sup> Source: Municipal and Traffic Court of New Orleans Clerk of Court. n = 2,437 (persons issued summons for marijuana possession), 434 (persons arrested for marijuana possession).

- **Recommendation 10:** The public and the tourism industry should educate themselves on the marijuana laws in New Orleans and ensure public material such as websites provide the correct information about when an individual is able to receive a summons for a New Orleans Municipal Code marijuana violation and when an individual is not able to receive a summons. The tourism industry and others should remove all references to marijuana being decriminalized in New Orleans.

### **Efficiency--Criminal District Court's Oldest Cases**

Tracking efficiency has been part of CWN's core mission for the last 11 years. It is essential when a not-for-profit monitors for efficiency that the not-for-profit examines the real drivers of inefficiency. Instead of placing the full blame for inefficiency on judges, it is a priority to reveal the real causes of inefficiency in the Orleans Parish Criminal Courts, especially since, in many instances, judges are powerless to stop the inefficiency.<sup>44</sup> CWN examined the ninety-eight oldest active cases in Criminal District Court, beginning with a case instituted in 2005. The top reasons for delay in these cases were: 34% because an incarcerated defendant was not brought to court when scheduled; 16% for continuances requested by the prosecution;<sup>45</sup> 11% for continuances requested by the defense;<sup>46</sup> 11% for continuances on joint motion (between the prosecution and the defense);<sup>47</sup> 7% for continuances requested by the Court;<sup>48</sup> and in 6%, because the defendant appeared without counsel. The type of delays CWN tracked involved anything from delays of days to delays of months. CWN further analyzed the largest delay for why incarcerated defendants were not brought to court by the responsible agency. Out of all of the delays caused by an incarcerated defendant not being brought to court, in 57% of continuances, the Orleans Parish Sheriff's Office was responsible for not bringing the defendant to court; in 38% of continuances, the Louisiana Department of Corrections was responsible for not bringing the defendant to court; and in 5% of continuances, the Eastern Louisiana Mental Health System was responsible for not bringing the defendant to court. The court and the prosecution can do little to get a jailed defendant into court (the number one reason for inefficiency according to CWN data in Figure 24) if OPSO has not informed the court or the prosecution which jail facility in which the defendant is located.

<sup>44</sup> State v. Barnes, 72 So. 3d 938 (La. App. 4 Cir. 8/29/2011). This Court has previously found, in unpublished writ dispositions, that it is an abuse of the trial court's discretion to deny a motion for continuance when both sides in a criminal case agree to a continuance of trial; See also State v. Lee, 11-1176 (La. App. 4 Cir. 8/25/11); State v. Richardson, 09-0953 (La. App. 4 Cir. 7/20/09); State v. King, 11-0243 (La. App. 4 Cir. 2/18/11); State v. Terry, 11-0245 (La. App. 4 Cir. 2/18/11).

<sup>45</sup> In 917 of these continuances, the minute entry in the docket merely said the case was continued by the State. In 29 of these continuances, a law enforcement witness was unavailable. In 24 of these continuances, the Assistant District Attorney ("ADA") was unavailable. In 22 of these continuances, the ADA owed discovery to the defense. In 3 of these continuances, the ADA was unprepared. In 2 of these continuances, a civilian witness for the prosecution was unavailable. In 1 continuance, the ADA had not requested the defendant to be brought from jail.

<sup>46</sup> In 466 of these continuances, the minute entry in the docket merely said the case was continued by the defense. 80 continuances occurred because of a change in defense attorney. In 78 of these continuances, the defendant had been released and did not return to court. 41 continuances occurred because the defense attorney was unavailable, and 7 continuances occurred because a witness for the defense was unavailable.

<sup>47</sup> In 556 of these continuances, the minute entry in the docket merely said the case was continued by joint motion. In 47 continuances, the Court ruled the defendant incompetent, and in 35 continuances, the Court ruled the defendant competent. 24 continuances occurred due to writs to the Fourth Circuit Court of Louisiana, and 17 continuances occurred due to writs to the Supreme Court of Louisiana.

<sup>48</sup> 157 continuances occurred because the Court was closed. In 147 continuances, the Court was trying another case. In 94 of these continuances, the minute entry in the docket merely said the case was reset by the Court. In 76 of these continuances, the case was transferred to another court.

- **Recommendation 11:** Judges are not solely responsible for court inefficiency and the public should educate themselves on this issue. The Orleans Parish Sheriff's Office should ensure that criminal defendants are brought to court. The Orleans Parish Sheriff's Office should also ensure that the court and the prosecution are properly notified as to whether an incarcerated defendant is being held in the Orleans Justice Center or in another jail within the jurisdiction of the Department of Corrections.

## II. INTRODUCTION

CWN is a not-for-profit organization whose mission is to promote reform in the Orleans Parish criminal court system through civic engagement and courtroom observation. One of CWN's goals is to empower the New Orleans community through legal education to demand transparency and accountability of public officials. CWN is objective in its approach, neither siding with the prosecution nor the defense on individual cases. Rather, CWN tries to increase public confidence in the Orleans Parish Criminal Courts by examining aggregate trends in the Orleans Parish criminal justice system and bringing transparency to court practices largely hidden from public view. It is CWN's belief that only when corruption and systemic conflicts are unearthed can New Orleans elect the public officials it truly deserves as an educated and informed community; only when the criminal justice system becomes more transparent and conflicts of interest are resolved does the public come to trust the system. According to the American Sociological Association,

A conflict of interest arises when personal interest prevents an individual from performing their professional or public obligations in an unbiased manner. The consequences of these conflicts can be the loss of objectivity, the potential for decreased effectiveness as a professional, and the possibility of harm and/or exploitation of another party.<sup>49</sup>

Conflicts of interest arise when an individual has private interests which could improperly influence the performance of that individual's official duties and responsibilities. Public officials who succumb to conflicts of interest can undermine the way decisions and power affect the public, as well as the way public resources and funds are used.

Conflicts of interest also occur in the not-for-profit sector. The loss of objectivity and conflicts of interest in the not-for-profit arena can encourage the public to lend a blind eye to public corruption and government ineffectiveness. This happens, for example, when a not-for-profit tries to protect an ethically-challenged public official who may have previously aided the organization. This encourages the public to believe that those institutions that are supposed to aid in combatting corruption are really a part of the larger problem. As outgoing Special Agent in Charge of the FBI for Louisiana Jeff Sallet, said of corruption in Louisiana,

The way the system has been set up, there's been neglect throughout the

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<sup>49</sup> Michael McDonald, Ethics & Conflict of Int., U. of B.C., [ethics.ubc.ca/people/mcdonaldconflict-hm/](https://ethics.ubc.ca/people/mcdonaldconflict-hm/) (last visited May 1, 2019).

years. The expectations of the people doing some of these jobs is, 'Hey I'm in an office, and I'm going to take what I can get.' And the people around them often fear confronting that. It is not much different from the fear I saw in organized crime in New York City, where people don't want to take on mob guys. People don't want to give up corrupt public officials, often because they're afraid of the consequences.<sup>50</sup>

Successfully tackling corruption and conflict of interest in government officials has been shown to lead to a wider acceptance of public institutions, decreased poverty and inequality levels, respect for the rule of law, strengthened political stability, higher productivity, more innovative thinking, and lower crime rates. Experts have pointed out that greater citizen trust is clearly needed to tackle corruption, but it is common that "powerful individuals and their narrow circles of allies do not have the slightest interest in benefiting anyone but themselves."<sup>51</sup>

Through its extensive legal training of volunteers, CWN seeks to shorten the gulf between "insiders" and "outsiders." Outsiders are the crime victims, witnesses, defendants, and jurors. Insiders are the public officials who run the system: the judges, prosecutors, defense attorneys, clerks of court, police officers, sheriff department officials, and others. CWN teaches outsiders the language of court so that outsiders can bring accountability and help to solve some of the problems that insiders have so regularly lived with that they often (and unfortunately) no longer see as problematic. Some of these problems include some of the highest rates in the country for murder, gunshots, female homicide, wrongful conviction, and incarceration. All CWN volunteers undergo eight hours of legal training before they are allowed into court to monitor. CWN volunteers are New Orleanians: poor and wealthy; old and young; black, white, Asian, and Hispanic; newcomers, and those from the most prominent New Orleanian families. CWN volunteers learn ethical standards, criminal procedure, the tenets of objectivity, best-practices, constitutional rights, state law, and municipal law. These New Orleanians observe Orleans Parish criminal courts and keep New Orleans public officials accountable. They collected the data that comprises the report below.

### III. METHODOLOGY

In 2018, CWN collected the observations of 113 volunteers in three different Orleans Parish criminal courts: Criminal District, Magistrate and Municipal. All observers participated in a two-day, eight-hour training before they began independent observations, and some observers received refresher trainings upon request.

Four physical data collection tools were used to record the data in the courtrooms: one for each court plus an additional data collection tool for Municipal Court first appearances. These data collection tools covered a wide variety of information, drawing primarily from CWN volunteers' in-

<sup>50</sup> Emily Lane, Public Corruption in La. 'Can't Get Much Worse,' Says Outgoing FBI New Orleans Dir., Nola.com, Nov. 3, 2017, available at [https://www.nola.com/crime/2017/11/public\\_corruption\\_fbi\\_new\\_orle.html](https://www.nola.com/crime/2017/11/public_corruption_fbi_new_orle.html).

<sup>51</sup> Org. for Econ. Co-operation and Dev., Managing Conflict of Int. in the Pub. Sector: A Toolkit, 2005, at 7, available at <https://www.oecd.org/gov/ethics/49107986.pdf>.

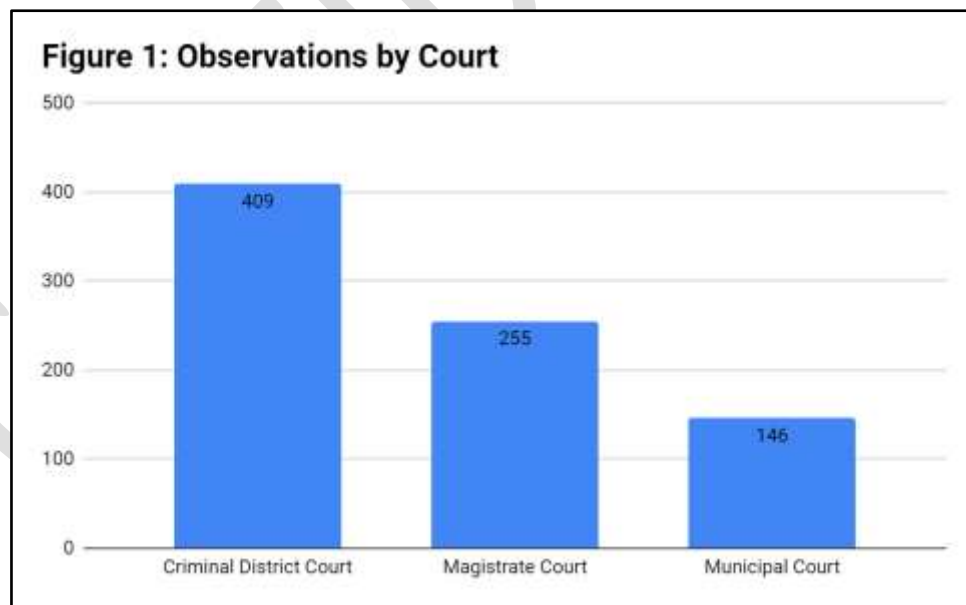
court observations and from the individual court dockets of cases. Court dockets were provided to CWN volunteers by the Orleans Parish Clerk of Court and the New Orleans Municipal Clerk of Court.

The data recorded on the data collection tools was then entered into an online database using Survey Monkey, a cloud-based survey development software. Data was exported to SPSS (Statistical Package for the Social Sciences, V20) for data cleaning and analysis.

Data was collected from January 1, 2018 to December 31, 2018. A total of 810 court session observations were conducted across all three courts. During these sessions, approximately 13,000 case appearances were observed, and key data was recorded. Details on the total observations by court are presented below. The data presented in this report and collected by the CWN volunteers is both quantitative and qualitative in nature.

Because CWN volunteers are not able to be present for all sessions of court in all courtrooms, it is important to note that CWN's data typically captures an underestimate of the number of occurrences of any one examined issue. The data presented in this report, therefore, represents a sample, or minimum number of incidents.

Figure 1 shows the number of court session observations (hereafter referred to as "observations") conducted in 2018 in each of the three courts. Hereafter, "all courts" refers to all criminal courts that CWN currently monitors, namely Orleans Parish Criminal District Court, Orleans Parish Magistrate Court, and New Orleans Municipal Court.



$n = 810$  total observations.



## IV. JUDICIAL ETHICS & CONFLICTS OF INTEREST IN ORLEANS PARISH CRIMINAL COURTS

### A. CAMPAIGN FINANCE

In order to ensure the public's faith in the independence of the judiciary, the public must believe that judges are transparent and are not unduly influenced by the campaign contributions they receive.<sup>52</sup> According to a 2011 national public opinion poll, only 5% of Americans surveyed believe that campaign contributions have no influence at all on judges,<sup>53</sup> and over 70% of Americans believe that campaign contributions have some influence on judges' decisions in the courtroom.<sup>54</sup> According to this same poll, only 33% of those surveyed believe that the "justice system in the U.S. works equally for all citizens," while 62% believe that "[t]here are two systems of justice in the U.S. – one for the rich and powerful and one for everyone else."<sup>55</sup> Perhaps more telling than general public polls, judges themselves report the influence campaign contributions have on the independence of their judgments. In a 2002 survey of 2,428 state (lower, appellate, and supreme) court criminal and civil judges, 26% of judges admitted that campaign contributions have at least "some influence" on their decisions and 46% of judges said they believe contributions have at least "a little influence."<sup>56</sup>

CWN tracks the public's perception and confidence in the criminal courts of New Orleans and the confidence in those officials who work in the criminal courts. It is important for judges to distance themselves from situations where their fairness and impartiality might reasonably be questioned.<sup>57</sup> Unless they embrace the public's demand for accountability, the courts should not be surprised when the public loses confidence and reacts with outrage over the lack of judicial independence.<sup>58</sup>

The Louisiana Code of Judicial Conduct sets the standards by which all judges in the State of Louisiana must abide. The Louisiana Code of Judicial Conduct is enforced by the Judiciary Commission of Louisiana. The Code of Judicial Conduct states in part:

- A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary. . . . A judge

<sup>52</sup> James Sample et al., *Fair Cts.: Setting Recusal Standards*, Brennan Ctr. for Justice, at 9 (2008), available at [http://www.brennancenter.org/sites/default/files/legacy/Democracy/Recusal%20Paper\\_FINAL.pdf](http://www.brennancenter.org/sites/default/files/legacy/Democracy/Recusal%20Paper_FINAL.pdf).

<sup>53</sup> Greenberg, Quinlan, Rosner Research Inc. & American Viewpoint, *Justice at Stake Frequency Questionnaire*, <https://www.brennancenter.org/sites/default/files/2001%20National%20Bipartisan%20Survey.pdf>, at 4 (Oct. 30-Nov. 7, 2001).

<sup>54</sup> Adam Skaggs, *Buying Just.: Impact of Citizens United on Judicial Elections*, Brennan Ctr. for Just., 4 (2010), available at <https://www.brennancenter.org/sites/default/files/legacy/publications/BCReportBuyingJustice.pdf?nocdn=1>.

<sup>55</sup> Greenberg, Quinlan, Rosner Research Inc. & American Viewpoint, *Justice at Stake Frequency Questionnaire*, at 4; *Justice at Stake Campaign*, March 2004 Survey Highlights: Americans Speak Out on Judicial Elections (2004) page 4-10, [faircourts.org/fles/ZogbyPollFactSheetpdf](http://faircourts.org/fles/ZogbyPollFactSheetpdf) (accessed Mar. 26, 2019, info. no longer accessible online).

<sup>56</sup> Greenberg, Quinlan, Rosner Research Inc. & American Viewpoint, *Justice at Stake Frequency Questionnaire*, at 5; See also Stuart Banner, *Disqualifying Elected Judges from Cases Involving Campaign Contributors*, 40 Stan. L. Rev. 449, 463-66 (1988) (providing examples of comments by elected judges that suggest that contributions influence case outcomes).

<sup>57</sup> Greenberg, Quinlan, Rosner Research Inc. & American Viewpoint, *Justice at Stake Frequency Questionnaire*, at 4; *Justice at Stake Campaign*, March 2004 Survey Highlights: Americans Speak Out on Judicial Elections (2004) page 4-10, [faircourts.org/fles/ZogbyPollFactSheetpdf](http://faircourts.org/fles/ZogbyPollFactSheetpdf) (accessed Mar. 26, 2019, info. no longer accessible online).

<sup>58</sup> *Id.*



shall not allow family, social, political, or other relationships to influence judicial conduct or judgment.<sup>59</sup>

- A judge shall refrain from financial and business dealings that tend to reflect adversely on the judge's impartiality, interfere with the proper performance of judicial duties, exploit the judge's judicial position, or involve the judge in frequent transactions with lawyers or persons likely to come before the court on which he or she serves.<sup>60</sup>
- A judge shall not accept, directly or indirectly, any gifts, loans, bequests, benefits, favors or other things of value that might reasonably appear as designed to affect the judgment of the judge or influence the judge's official conduct, or would appear to a disinterested reasonable person to undermine the judge's independence, integrity, or impartiality.<sup>61</sup>

The Code of Judicial Conduct teaches judges that, in order for the community to retain confidence in them, the judge must not only be independent and honest, but just as importantly, the judge must be *believed by all* to be independent and honest.<sup>62</sup> As one expert wrote, "Justice must not only be done, it must be seen to be done. Without the appearance as well as the fact of justice, respect for the law vanishes in a democracy."<sup>63</sup> The Judge's actions need not be intentional,<sup>64</sup> criminal or tortious for the judge to be sanctioned.<sup>65</sup> If there is clear and convincing evidence that a judge violated the Louisiana Code of Judicial Conduct, this is sufficient for sanction.<sup>66</sup> The canons' broader prescription against the influence of outside individuals seeks to ensure that a judge will not allow family or other relationships to influence the exercise of judicial conduct or judgment, regardless of whether the judge is actually presiding over a case involving a friend or relative.<sup>67</sup>

In *In re Morvant*,<sup>68</sup> the Louisiana Supreme Court determined that Judge Morvant violated Louisiana Judicial Canon 2B, when the judge required defendants to pay money to a not-for-profit as a condition of probation for those who appeared in front of his court. A violation of the judicial canons occurred, but, as an advisory council member, the judge's activity did not meet the more serious threshold, since they had "no fiduciary obligations, . . . and . . . no authority to direct how . . . funds are utilized."<sup>69</sup> Regardless, the judge was found to have advanced the private interests of the program and his own private interests since "those associated with the program . . . could only have benefitted in the event he were reelected."<sup>70</sup> The Supreme Court determined that the judge, "potentially placed the judiciary as a whole in a negative light because the general public could reasonably perceive he misused his judicial power to favor an organization,

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<sup>59</sup> La. Code Jud. Con. § 2(A)(B).

<sup>60</sup> La. Code Jud. Con. § 5(C).

<sup>61</sup> La. Code. Jud. Con. § 6(B)(1).

<sup>62</sup> See Leslie Abramson, Canon 2 of the Code of Judicial Conduct, 79 Marquette L. Rev. 962 (1996).

<sup>63</sup> *Id.* at 963.

<sup>64</sup> *In re Hunter*, 02-1875, p. 16 (La. 8/19/02); 823 So.2d 325, 336 ("[A] judge may also, through negligence or ignorance not amounting to bad faith, behave in a manner prejudicial to the administration of justice so as to bring the judicial office into disrepute."). See also *In re Elloie*, 05-1499, pg. 30 (La. 1/19/06); 921 So. 2d 882.

<sup>65</sup> *In re Hunter* at 955.

<sup>66</sup> *In re Elloie* at 30.

<sup>67</sup> *Id.* at 60.

<sup>68</sup> *In re Morvant*, 09-0747 (La. 6/26/09) 5 So.3d 74.

<sup>69</sup> *Id.* at 77.

<sup>70</sup> *Id.*

although he did not finally profit by his actions.”<sup>71</sup>

Likewise, in *In re: Donald Johnson*, the Louisiana Supreme Court found that Judge Donald Johnson violated the Louisiana Code of Judicial Conduct when he required defendants to pay fines to various civic or charitable organizations in cases where the charitable organizations were not themselves the crime victims.<sup>72</sup> As was the case in *In re Morvant*, although the judge’s activity did not demonstrate that he personally financially profited, the Louisiana Supreme Court still found his conduct amounted to “persistent and public conduct prejudicial to the administration of justice that brought the judicial office into disrepute.”<sup>73</sup> The court commented at length that the Judge “placed the judiciary as a whole in a negative light because it led private groups to believe they could properly solicit funds for worthy causes from Judge Johnson—in other words, they were left with the perception that he could use his judicial office for their private benefit, which flies in the face of well accepted ethical precepts.”<sup>74</sup>

Against this legal backdrop, CWN examined Orleans Parish Criminal District Court judges’ use of pre-trial programs for which defendants were required to pay out of pocket. While the above Louisiana Supreme Court examples pinpoint cases where a judge did not benefit financially but were still nonetheless sanctioned, CWN’s report focuses on activity where a judge did appear to benefit financially from requiring the parties in front of the judge to engage in specific activity. Specifically, CWN examined the 2018 use of ankle monitoring companies by individual Orleans Parish Criminal District Court judges and the New Orleans Magistrate Judge.<sup>75</sup> Ankle monitoring companies, generally speaking, place a GPS device on the defendant’s ankle and the GPS device records the location of the defendant, allowing the company to determine if the defendant was abiding by the curfew and geographical confines required by the judge.<sup>76</sup> The Orleans Parish Criminal District and Magistrate Courts have no formal contracts with private pre-trial services companies or ankle monitoring companies.<sup>77</sup> An ankle monitor will usually cost a criminal defendant at least \$10 a day with an installation fee of \$100 or more.<sup>78</sup> The defendant will often be required by the Orleans Parish Criminal District Court to wear the ankle monitor for several months, a hardship for a criminal defendant population that is 85% indigent.<sup>79</sup> Although some theorists have opined that ankle monitoring is not a proper mechanism for criminal cases<sup>80</sup> or does

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<sup>71</sup> *Id.* at 78.

<sup>72</sup> *In re Johnson*, 1 So.3d 425, 425 (2009).

<sup>73</sup> *Id.* at 433.

<sup>74</sup> *Id.* at 437.

<sup>75</sup> CWN did not research the Magistrate Court Commissioner’s ankle monitoring practices because Orleans Parish Magistrate Commissioners are not elected and thus do not receive campaign contributions.

<sup>76</sup> Alt. to Incarceration, A2i Program, <http://www.a2inola.com/about-a2i.html> (last visited Apr. 27, 2019); SCRAM Systems, SCRAM GPS®, <https://www.scramsystems.com/products/scram-gps/> (last visited Apr. 27, 2019).

<sup>77</sup> Interview with Robert Kazik, Judicial Adm’r, Criminal Dist. Ct. (Mar. 22, 2018).

<sup>78</sup> Letter from Christian Helmke to Danny Engleberg, Chief of Trials, Orleans Public Defenders (Jun. 25, 2018).

<sup>79</sup> Email from Lindsey Hortenstine, Dir. of Comm’n and Development, Orleans Public Defenders, to Simone Levine, Executive Dir., Ct. Watch NOLA & Veronica Bard, Deputy Dir., Ct. Watch NOLA (4/12/19, 09:54 CST) (on file with author).

<sup>80</sup> Michelle Alexander, *The Newest Jim Crow: Recent Criminal Justice Reforms Contain the Seeds of A Frightening System Of “E-carceration,”* N.Y. Times, Nov. 8, 2018 (“Many reformers rightly point out that an ankle bracelet is preferable to a prison cell. Yet I find it difficult to call this progress. As I See it, digital prisons are to mass incarceration what Jim Crow was to slavery”).

not sufficiently protect public safety,<sup>81</sup> other theorists believe that ankle monitoring is a viable jail alternative.<sup>82</sup> CWN does not examine this issue, especially since it involves an individualized assessment to be made on a case-by-case basis; CWN examines aggregate trends and not individual cases. Instead, CWN has examined the conflict of interest that arises when a judge receives campaign financing from an ankle monitoring company executive, the judge requires defendants to wear an ankle monitor, and then the Judge “steers” the defendant to use the ankle monitoring company from which the judge has received campaign financing.

There were at least two different companies that offered ankle monitoring services in 2018, two different private for-profit companies (ETOH and A2i)<sup>83</sup> and one public agency, the Home Incarceration Program through the Gretna Police Department.<sup>84</sup> In examining campaign contributions from 2008-2018, CWN found that five Criminal District Court judges received campaign contributions from the executives that run ETOH Monitoring. The Executives that run ETOH monitoring provided judges with campaign contributions in their personal capacity or through the executive’s law firms. The executives of the A2i company were not found to have made reported campaign contributions from 2008-2018.<sup>85</sup> CWN examined all ankle monitoring cases of judges who received campaign contributions given to them by ankle monitoring executives, in order to ensure the judge was not steering a defendant to the specific company that provided the judge with the campaign contribution or loan. For the purpose of being objective in its investigation and transparent with the public about the CWN’s investigation process, CWN listed all judges who received campaign contributions from ankle monitoring executives regardless of whether CWN found the judge had any ankle monitoring cases or not. This report does not suggest it is unethical for judges to receive campaign contributions from ankle monitoring executives if judges do not steer defendants to use the specific ankle monitoring company that contributed or provided a loan to that judge. In some circumstances judges may not even know the identity of a campaign donor who has contributed to their campaign; this may be true for example where a Judge received a single contribution from a campaign donor.<sup>86</sup> CWN examined over 80 criminal court case files, reviewed over 60 transcripts, and spoke to over 70 criminal justice attorneys (both prosecutors and defense) and various court staff in its review of

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<sup>81</sup> Jack Kartson & Darrell West, Decades Later, Electronic Monitoring of Offenders is Still Prone to Failure, Brookings Inst., Sept. 21, 2017, available at <https://www.brookings.edu/blog/techtank/2017/09/21/decades-later-electronic-monitoring-of-offenders-is-still-prone-to-failure/>.

<sup>82</sup> Jesse Kelley, Active Electronic Monitoring a Viable Alternative to pre-trial Incarceration, The Hill, Jun. 18, 2018, available at <https://thehill.com/opinion/criminal-justice/392857-active-electronic-monitoring-a-viable-alternative-to-pre-trial>.

<sup>83</sup> CWN did not find any evidence that other companies provided defendants with ankle monitors in conjunction with a judicial requirement. Bail bond companies may require individual defendants to wear ankle monitors for the purposes of tracking those defendants for whom the bail bond company paid bonds. However, where such ankle monitoring activities were not requested by a judge, CWN did not track campaign contributions from these businesses. CWN received an affidavit from Blair Bonds, one of the larger bond companies, establishing this company did not provide ankle monitoring services to a defendant in conjunction with a judicial order in 2018.

<sup>84</sup> The Home Incarceration Program is government-funded and works within the Gretna Police Department. Orleans Parish Criminal District Court can specifically request defendants are a part of this program or the defendant may be required to undergo ankle monitoring with the Home Incarceration Program as part of their probation. Telephone Interview between Yael Acker-Krzywicki and Officer Melinda Reed (May 2, 2019).

<sup>85</sup> While it is possible that associates, family members (with a different last name), or acquaintances of ankle monitoring company executives contributed to Orleans Parish Criminal Court Judges or the Magistrate, CWN was unable to determine this.

<sup>86</sup> Telephone Interview with Tracey Flemings-Davillier, Judge, Orleans Parish Crim. Dist. Ct. (May 10, 2019).

Orleans Parish Criminal District Court's use of ankle monitoring companies. CWN found a total of 94 cases where defendants were required to wear ankle monitors in 2018. This represents the minimum number of 2018 ankle monitoring cases with the maximum number likely being much larger.<sup>87</sup> CWN examined only 2018 ankle monitoring cases, since CWN's annual report only includes 2018 observations. Out of the five judges, Judges White, Flemings-Davillier, Bonin, Derbigny, and Zibilich who received campaign contributions from ankle monitoring executives or their companies, only Judges White, Bonin, and Derbigny were found to have ordered ankle monitoring of defendants in 2018. However, Judge Bonin was the only judge found to have required a defendant use an ankle monitor and then steered the defendant to pay a specific ankle monitoring company (over other companies) from which the judge had received campaign contributions or a loan. CWN found no 2018 ankle monitoring cases in front of Judges Flemings-Davillier or Zibilich. CWN found that Judges White and Derbigny did not steer any criminal defendant to a particular ankle monitoring company. In Judge White's only 2018 ankle monitoring case, she stated in open court, "I don't know who does monitoring, other than, I don't even know the name of them."<sup>88</sup> This report does not suggest it is unethical for judges to receive campaign contributions from ankle monitoring executives if judges did not steer defendants to use the ankle monitoring company that contributed or provided a loan to the judge. In some circumstances, judges may not even know the identity of a campaign donor who has contributed to their campaign. This may especially be true where a Judge received a single contribution from a campaign donor.<sup>89</sup>

The only ankle monitoring company executives providing campaign contributions or loans to any Criminal District Court Judges or the Magistrate Judge according to campaign finance records were those executives from ETOH Monitoring, Inc.<sup>90</sup> Table 1, below, indicates the judges who received a campaign contribution(s) from ankle monitoring executives and the number of cases (if any) in which the Judges required the defendant to use ankle monitors. Campaign contributions in Table 1 are listed by the ankle monitoring company run by the executive, regardless of whether the campaign contribution was provided by the ankle monitoring executives in their personal capacity, the ankle monitoring company itself, or another company run by the ankle monitoring executive. Table 1 also indicates whether CWN found evidence that a judge steered a defendant to a specific ankle monitoring company.

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<sup>87</sup> These 86 cases represent the minimum number of ankle monitoring cases in 2018. Orleans Parish Criminal District court does not collect or aggregate this information, and ankle monitoring companies did not provide data to CWN upon request.

<sup>88</sup> Court Transcript transcribed by Stenographer Marlene Rodriguez, Criminal District Court Section A, Case Number 535060 (September 28, 2018).

<sup>89</sup> Telephone Interview between Simone Levine, Veronica Bard and Judge Flemings-Davillier (May 10, 2019).

<sup>90</sup> These 86 cases represent the minimum number of ankle monitoring cases in 2018. Orleans Parish Criminal District court does not collect or aggregate this information, and ankle monitoring companies did not provide data to CWN upon request.

**Table 1: Judges who Received Campaign Contributions from Ankle Monitoring Companies**

<i>Judge</i>	<i>Required an Ankle Monitor for a Defendant in 2018</i>	<i>Ankle Monitoring Executive's Campaign Contribution between 2008-2018</i>	<i>Ankle Monitoring Executive's Campaign Loan between 2008-2018</i>	<i>Steered Defendants to a Specific Company in 2018</i>	<i>Dates of Campaign Contributions &amp; Loan between 2008-2018</i>
White	1	\$900 (ETOH) <sup>91</sup>	\$0	No	(1x) 2016 ETOH (1x) 2014 ETOH
Flemings-Davillier	None found	\$250 (ETOH) <sup>92</sup>	\$0	No ankle monitoring cases found	(1x) 2014 ETOH
Bonin	23	\$8,150 (ETOH) <sup>93</sup>	\$1,000 <sup>94</sup>	Yes: ETOH	(5x) 2016 ETOH (2x) 2012 ETOH (1x) 2008 ETOH
Derbigny	7	\$1,300 (ETOH) <sup>95</sup>	\$0	No	(1x) 2014 ETOH (1x) 2013 ETOH (1x) 2012 ETOH (1x) 2008 ETOH
Zibilich	None found	\$250 (ETOH) <sup>96</sup>	\$0	No ankle monitoring cases found	(1x) 2013 ETOH

Judge Bonin received both a campaign contribution and a campaign loan from ETOH executives.<sup>97</sup> Judge Bonin received a \$1,000 campaign loan from ETOH executives in his successful 2016 election that made him a sitting judge in Criminal District Court Section D.<sup>98</sup> Looking back for

<sup>91</sup> La. Ethics Admin. Program, La. Campaign Fin. Rep. No. 60205 for Laurie White (10/11/16); La. Ethics Admin. Program, La. Campaign Fin. Rep. No. 59473 for Laurie White (7/11/16).

<sup>92</sup> La. Ethics Admin. Program, La. Campaign Fin. Rep. No. 60205 for Tracey Flemings-Davillier (10/11/16).

<sup>93</sup> La. Ethics Admin. Program, La. Campaign Fin. Rep. No. 61852 for Paul Bonin (1/19/17); La. Ethics Admin. Program, La. Campaign Fin. Rep. No. 60688 for Paul Bonin (11/4/16); La. Ethics Admin. Program, La. Campaign Fin. Rep. No. 35430 for Paul Bonin (2/15/13); La. Ethics Admin. Program, La. Campaign Fin. Rep. No. 32109 for Paul Bonin (8/8/12); La. Ethics Admin. Program, La. Campaign Fin. Rep. No. 804529 for Paul Bonin (10/4/08).

<sup>94</sup> La. Ethics Admin. Program, La. Campaign Fin. Rep. No. 59725 for Paul Bonin (8/10/16).

<sup>95</sup> La. Ethics Admin. Program, La. Campaign Fin. Rep. No. 47056 for Darryl Derbigny (2/9/15); La. Ethics Admin. Program, La. Campaign Fin. Rep. No. 39018 for Darryl Derbigny (2/10/14); La. Ethics Admin. Program, La. Campaign Fin. Rep. No. 37671 for Darryl Derbigny (11/21/13); La. Ethics Admin. Program, La. Campaign Fin. Rep. No. 806891 for Darryl Derbigny (10/27/08).

<sup>96</sup> La. Ethics Admin. Program, La. Campaign Fin. Rep. No. 38519 for Franz Zibilich (1/26/14).

<sup>97</sup> La. Ethics Admin. Program, La. Campaign Fin. Rep. No. 59725 for Paul Bonin (8/10/16). La. Ethics Admin. Program, La. Campaign Fin. Rep. No. 61852 for Paul Bonin (1/19/17); La. Ethics Admin. Program, La. Campaign Fin. Rep. No. 60688 for Paul Bonin (11/4/16); La. Ethics Admin. Program, La. Campaign Fin. Rep. No. 35430 for Paul Bonin (2/15/13); La. Ethics Admin. Program, La. Campaign Fin. Rep. No. 32109 for Paul Bonin (8/8/12); La. Ethics Admin. Program, La. Campaign Fin. Rep. No. 804529 for Paul Bonin (10/4/08).

<sup>98</sup> La. Ethics Admin. Program, La. Campaign Fin. Rep. No. 59725 for Paul Bonin (8/10/16).

ten years, Judge Bonin has received at least \$8,150 in campaign financing from ETOH executives over the space of two political campaigns.<sup>99</sup> The maximum campaign contribution a judge may receive from an individual or a legal entity per political campaign is \$2,500.<sup>100</sup> Judge Bonin has had two elections over the last ten years and ETOH's two executives have contributed to Judge Bonin's campaign during that time. CWN examined only 2018 cases where Judge Bonin required ankle monitoring, since CWN's annual report includes only 2018 observations, but found numerous cases not included in this report where ankle monitoring was required in 2017 and 2019, the only other years Judge Bonin was sitting on the Criminal District Court bench. Judge Bonin was also well-known when he was a traffic court judge from 1997-2008 for requiring those who attended traffic court to use and pay for ankle monitors.<sup>101</sup>

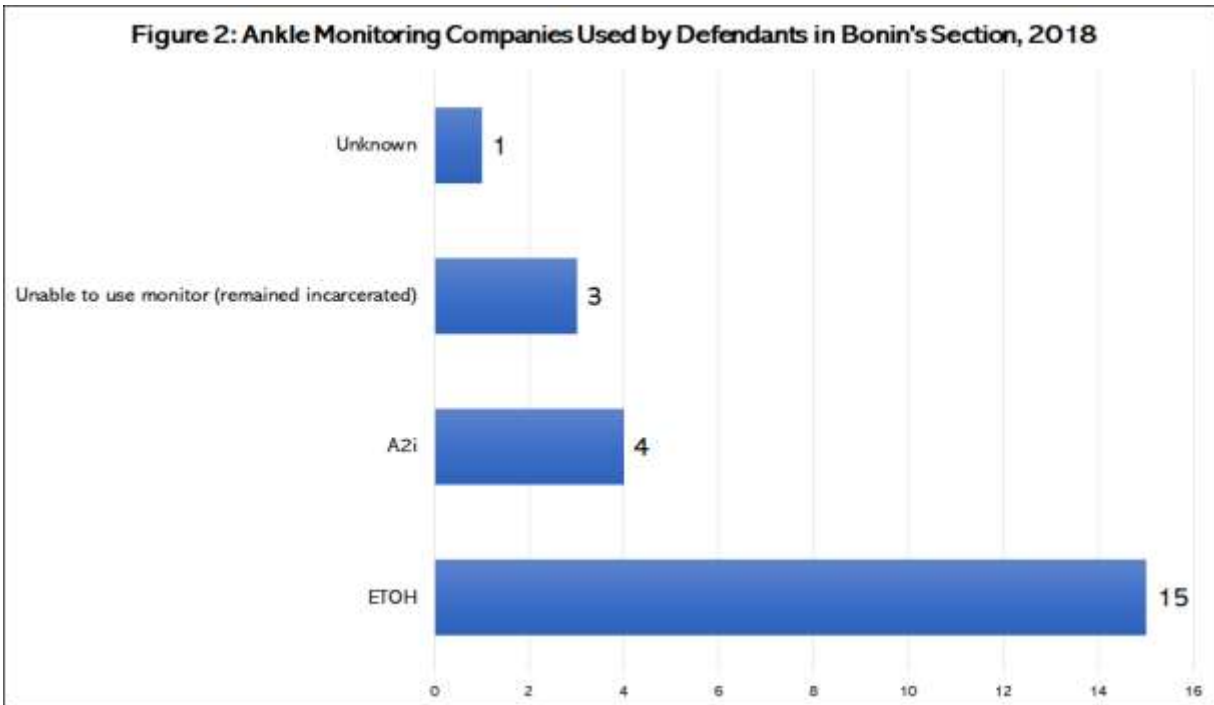
In the 2018 cases where Judge Bonin required a defendant to pay for and use ankle monitoring, the Judge made it a regular practice of recommending defendants use ETOH, informing defense attorneys in open court that he would email them the details on how the defendant could sign up for ankle monitoring services. The Judge made a regular practice of then emailing the defense attorneys with the contact information for ETOH while copying ETOH executives on the same email. On occasion, the judge would require court staff to provide the defendant or the defendant's family members with the contact information for ETOH. CWN has retained both the emails as well as the contact papers the judge provided to defendants in steering defendants to the ETOH monitoring company. When a defendant in front of Judge Bonin went with a different ankle monitoring company, it was because the bail bond company that paid the defendant's bail also offered ankle monitoring services and/or the defendant disregarded the judge's suggestion. On one occasion, the defendant's bail bond company met to convince the Judge that it (as compared to ETOH) should be the ankle monitoring company. Figure 2 shows the ankle monitoring companies used by defendants in Judge Bonin's courtroom in all 2018 cases.

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<sup>99</sup> La. Ethics Admin. Program, La. Campaign Fin. Rep. No. 61852 for Paul Bonin (1/19/17); La. Ethics Admin. Program, La. Campaign Fin. Rep. No. 60688 for Paul Bonin (11/4/16); La. Ethics Admin. Program, La. Campaign Fin. Rep. No. 35430 for Paul Bonin (2/15/13); La. Ethics Admin. Program, La. Campaign Fin. Rep. No. 32109 for Paul Bonin (8/8/12); La. Ethics Admin. Program, La. Campaign Fin. Rep. No. 804529 for Paul Bonin (10/4/08).

<sup>100</sup> La. Code Crim. Proc. Ann. R.S. 18:1505.2 H (1)(a).

<sup>101</sup> Rhonda Nabonne, Traffic Ct. Judge Paul Bonin Seeking Seat on 4th Cir. Ct. of Appeals, Nola.com, May 20, 2008, available at [https://www.nola.com/news/2008/05/bonin\\_Seeking\\_appeals\\_judgeshi.html](https://www.nola.com/news/2008/05/bonin_Seeking_appeals_judgeshi.html).



Source: Orleans Parish Criminal District Court, *n* = 23.

On several occasions, Judge Bonin refused to release the defendants from jail until the family had arranged for ETOH to set up ankle monitoring services, for example stating, "Reinstate the same bond but not until he--he can't be released from custody until the monitor has been placed on him. I will have them place it over there. I will send you an email before the afternoon."<sup>102</sup> On several occasions, Judge Bonin refused to release criminal defendants, after they had been on ankle monitors for months, from their ankle monitors solely because the defendants had not paid ETOH all the remaining fees the defendant owed to ETOH,<sup>103</sup> requiring the clerk to write in the minutes, "The court noted that the ankle monitor can be removed once the defendant has fulfilled his financial obligations owed to the ankle monitor company."<sup>104</sup> On other occasions, Judge Bonin threatened to put defendants back in jail and set bond for their failure to pay their remaining debts to the private ankle monitoring company.<sup>105</sup> Figure 3 shows the different ways Judge Bonin steered criminal defendants to the ETOH ankle monitoring company.

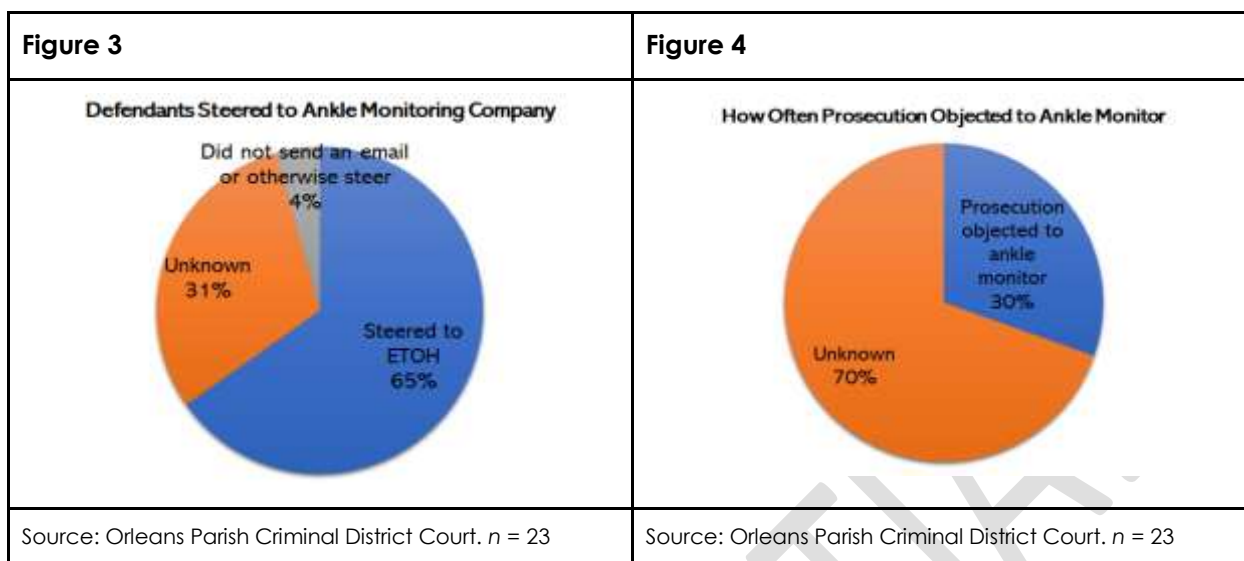
<sup>102</sup> Court Transcript transcribed by Stenographer Eve Kazik, Criminal District Court Section D., Case No. 542162, (Oct. 24, 2012).

<sup>103</sup> Court Transcript transcribed by Stenographer Eve Kazik, Criminal District Court Section D., Case No. 538515, (May 24, 2018).

<sup>104</sup> Orleans Parish Sheriff's Office Docket Master, Case No. 538515 (May 24, 2018), available at <http://www.opcso.org/dcktmstr/666666.php?&docase=538515>.

<sup>105</sup> E-mail from Confidential Source to Simone Levine, Executive Dir., Ct. Watch NOLA (Apr 22, 17:12 CST).

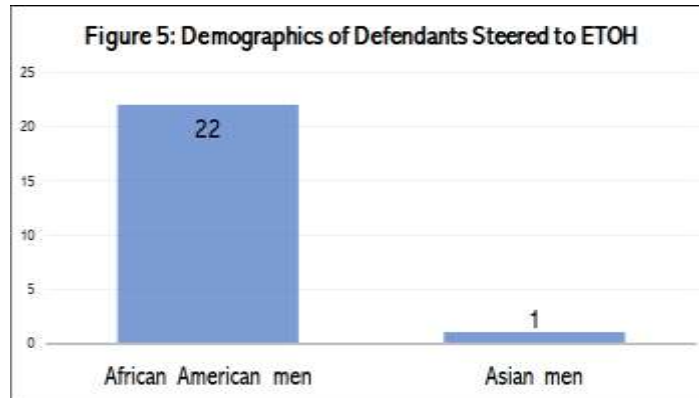




The public should not be left to wonder if an ankle monitor was required by a judge because it comported with public safety or if the ankle monitor was required by the judge because it financially benefited a judge's campaign contributor. Figure 4, above, shows how many times the prosecution objected to Judge Bonin's requirement that the defendant use an ankle monitor. Government contracts should go to the companies that charge the lowest prices and/or do the best work, not the ones that have connections to government officials.<sup>106</sup> Judges should not specify the company that a criminal defendant is to use where that same company has provided the judge with either a campaign contribution or a campaign loan. This is especially important when an often-indigent criminal defendant must pay that company to be released from jail, and the defendant's liberty and property (money) is at stake. Instead, if the judge requires a criminal defendant to use a company to show court compliance, the judge should inform the criminal defendant that they have a choice between companies or simply remain silent on the issue. Additionally, the judge should disclose orally or in writing any conflicts, particularly those involving campaign loans and campaign contributions, that might plausibly be construed as bearing on the judge's impartiality. One judge's disclosure would increase the reputational and professional costs of other judges who fail to disclose pertinent information that later publicly emerges.<sup>107</sup>

<sup>106</sup> Pub. Citizen, Pay-to-Play Pols., [www.citizen.org/our-work/government-reform/money-politics/pay-play-politics](http://www.citizen.org/our-work/government-reform/money-politics/pay-play-politics) (last visited May 2, 2019).

<sup>107</sup> James Sample et al., Fair Cts.: Setting Recusal Standards, Brennan Ctr. for Just., at 9 (2008), available at [http://www.brennancenter.org/sites/default/files/legacy/Democracy/Recusal%20Paper\\_FINAL.pdf](http://www.brennancenter.org/sites/default/files/legacy/Democracy/Recusal%20Paper_FINAL.pdf).



**RECOMMENDATION 1:** Judges should avoid conflicts of interest that reflect adversely on the judge's impartiality, interfere with the proper performance of the judge's duties, or exploit the judge's judicial position. Judges should not accept campaign funds and loans that might reasonably appear as influencing the judge's official conduct or undermining the judge's independence, integrity, or impartiality. Where it is impossible for a judge to avoid a conflict of interest, it is incumbent upon the judge to disclose the conflict of interest to the relevant parties to avoid the impression of impropriety.

#### B. ONE-PARTY SIDEBARS

There are relatively few explicit and narrow rules that judges are required to abide by in Louisiana. One of the narrow prohibitions listed in the Code of Judicial Conduct is the prohibition against ex parte contact, where one party speaks to the judge about the merits of a case without opposing counsel present.

The Louisiana Code of Judicial Conduct Canon 3A (6) states in part: "Except as permitted by law, a judge shall not permit private or ex parte interviews, arguments or communications designed to influence his or her judicial action in any case, either civil or criminal."<sup>108</sup>

Among the many dangers of ex parte contact is the danger that the opposing but absent party cannot refute an untrue claim made by the party speaking to the judge, since the opposing party has been excluded from the conversation.<sup>109</sup> Without opposing counsel present, the attorney engaging in the ex parte contact has the ability to exert influence without opposition. This influence may be in addition to any special relationship the attorney and judge enjoy, such as a long-standing friendship or a campaign contribution to the judicial campaign.<sup>110</sup> Ex parte

<sup>108</sup> La. Code Jud. Con. § 3(A)(6).

<sup>109</sup> Jack Weiss, It Depends on the Meaning of "Ex Parte," 29 Litigation 27 (2003) ("According to Professor Charles Wolfram, '[t]he purpose of the prohibition . . . is to prevent the communicating side from gaining an unfair advantage in the litigation: The advantage is created, of course, because the communication may influence the judge on an important decision without the absent party being able to rebut or qualify the communication as it is being made and with knowledge of the exact form in which it is being made'").

<sup>110</sup> Randall T. Shepard, Judicial Professionalism and the Relations Between Judges and Lawyers, 14 Notre Dame J.L. Ethics & Pub. Pol'y 223 (2000).

conduct has consistently been found by the Louisiana Supreme Court to violate the Louisiana Code of Judicial Conduct.<sup>111</sup> The Louisiana Supreme Court has specifically stated, “The handling of judicial matters ‘off-the-record’ gives at least the appearance of impropriety and lessens the public’s confidence in the integrity and impartiality of the judiciary.”<sup>112</sup> One-party sidebars, where ex parte contact occurs, are initiated by both the defense and the prosecution in Orleans Parish Criminal District Court.

From 2016 until present, CWN has tracked one-party sidebars, the discussion between the judge and either the defense or the prosecution, without the opposing party present, conducted at the bench or in judicial chambers, and outside the earshot of the public. Since both ex parte contact and one-party sidebars are often not publicly conducted, CWN volunteers are unable to hear enough of the conversation to determine what is ex parte contact (a discussion about the merits of the case) as compared to a one-party sidebar (where a judge and defense attorney could be talking about their next golf game, but are not referring to the criminal case). The former is unethical, and the latter, while not unethical under the Louisiana Judicial Code of Conduct, causes outsiders--crime victims, defendants, bystanders, and most of the general public--to find the system frustrating, insular, and unconcerned with proper justice. Input from some judges indicate that one-party sidebars may pertain to personal matters with the judge, a sick spouse, or inquire about the judge’s health. CWN would recommend that a judge publicly appear as transparent as possible by reserving personal well-wishing to a time when the judge is not on the bench. Judges may also consider announcing to the public before a one-party sidebar occurs, that the facts of a case are in fact not being discussed or that the matter being discussed is purely administrative.

Some attorneys or judges have questioned why one-party sidebars are a problem. Where national polls show that 62% of those surveyed believe that “[t]here are two systems of justice – one for the rich and powerful and one for everyone else.”<sup>113</sup> it is important to stop any avenue where backroom deals are made and those that are powerful have access to judges without opposing parties present. It is hard to distinguish for an outsider between harmless conversations a judge may have with a long-time friend, and those conversations a judge may have with a major political operative either from the criminal defense side or the prosecution side. And it is exactly for this reason, that the Louisiana Supreme Court and the Louisiana Code of Judicial Conduct have forbidden ex parte contact. Reducing one-party sidebars is one of the few ways we have to reduce the backroom deals that allow there to be a separate justice system for the powerful and a separate justice system for the poor and powerless.

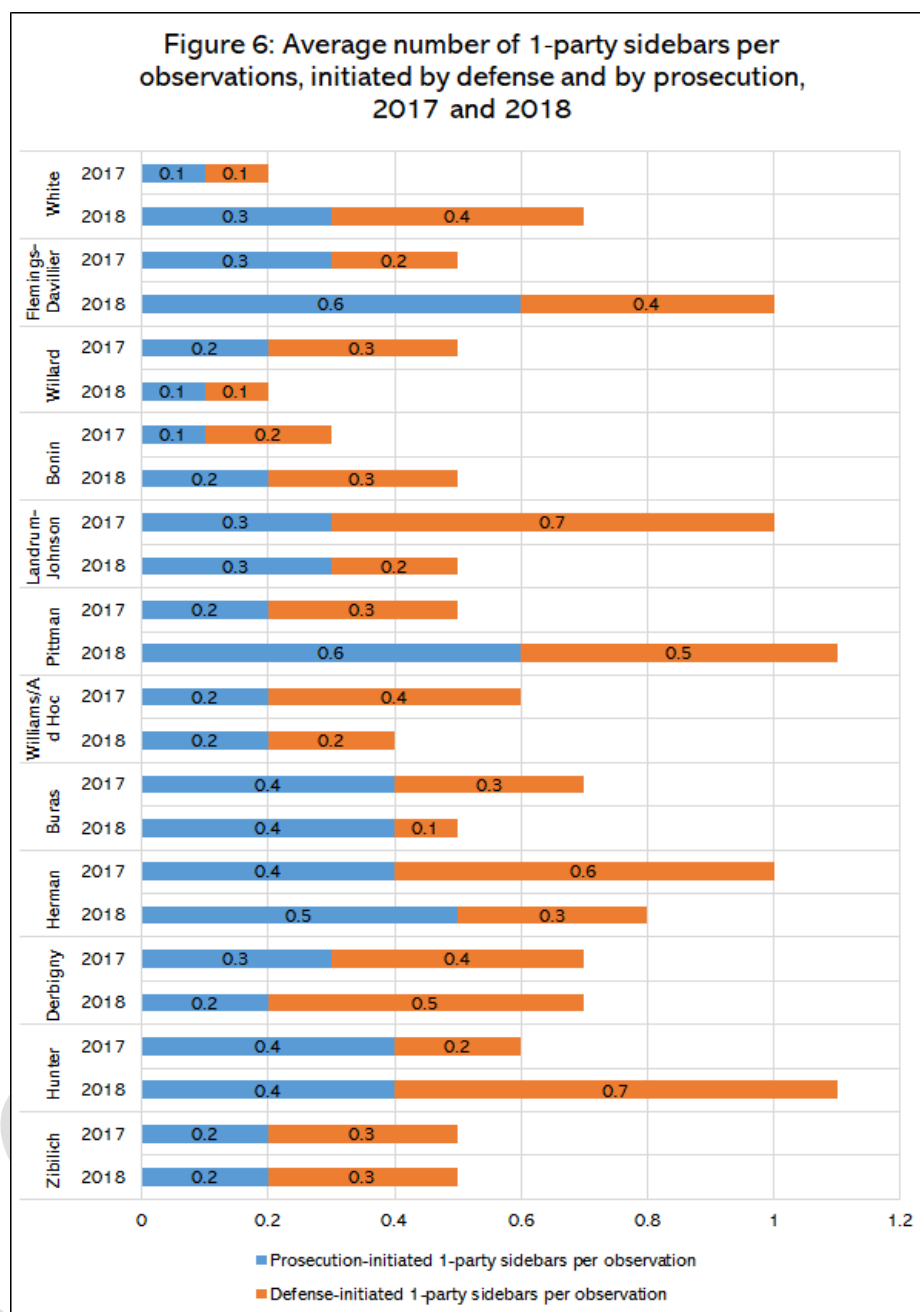
In Figure 6 below, CWN found that, on average, most judges are observed to have a 1-party sidebar in over half of observations of their courtrooms. CWN found that Judges Willard, Landrum-Johnson, Williams/the Ad Hoc Judge in Section G, Buras, and Herman decreased their frequency of 1-party sidebars between 2017 and 2018 and applauds such judges for doing so.

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<sup>111</sup> *In re Elloie* at 25; *In re Free*, 199 So.3d 571 (La. 2016).

<sup>112</sup> *Id.*

<sup>113</sup> Greenberg, Quinlan, Rosner Research Inc. & American Viewpoint, Justice at Stake Frequency Questionnaire, at 4; Justice at Stake Campaign, March 2004 Survey Highlights: Americans Speak Out on Judicial Elections (2004) page 4-10, [faircourts.org/files/ZogbyPollFactSheetpdf](http://faircourts.org/files/ZogbyPollFactSheetpdf) (accessed Mar. 26, 2019, info. no longer accessible online).



*n* = 397 observations (2017), 308 observations (2018).

**RECOMMENDATION 2:** Where a one-party sidebar is absolutely necessary for administrative reasons, judges should announce to the public that the facts of a case are not being discussed or that the matter being discussed is purely administrative. Judges should attempt to discontinue the practice of one-party sidebars, since it gives a public impression that undermines confidence in the judge's independence, integrity, and impartiality.

## C. INTOLERANCE & PREJUDICE

The Code of Judicial Conduct broadly prohibits a judge and their staff from showing prejudice and intolerance. Canon 3 of the Code of Judicial Conduct states in part, “A judge shall perform judicial duties without bias or prejudice.”<sup>114</sup> A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, and shall not permit staff, court officials or others subject to the judge’s direction and control to do so.”<sup>115</sup> Judges are also required to ensure that lawyers appearing in front of the court similarly desist from prejudice and intolerance. Canon 3(5) states, “A judge shall require lawyers in proceedings before the judge to refrain from manifesting, by words or conduct, bias or prejudice against parties, witnesses, counsel or others.”<sup>116</sup>

*I've seen how this Judge has previously treated male NOPD or LSP officers who testify in his courtroom. They are treated with respect, and usually given the benefit of the doubt when they mix up their testimony or make a mistake. However, the black female sex crime detective, testifying for a rape preliminary hearing involving 4 suspects, was continuously interrupted by not only the Judge but the private attorneys cross examining her . . . When a private attorney asked her a question and she replied, “I don't think I understand what you're saying,” he sharply replied, “I know you don't understand!”*

*-Courtwatcher comment from Magistrate Court*

Prohibiting public officials and court actors from manifesting bias and discrimination is essential for many reasons. Permitting a public official to openly engage in discrimination enables the public to believe that discriminatory attitudes, statements, and actions are acceptable, normal, and thus can be emulated and even escalated.<sup>117</sup> Where our public officials’ actions and words are discriminatory, studies have shown it can lead others to believe that discrimination in other contexts or the even more extreme next step, bias-motivated violence, is acceptable behavior or justified. Studies have also shown that it has become more socially acceptable for people to express prejudicial or hateful views when they hear their political leaders espouse discriminatory views.<sup>118</sup> The FBI has recorded a rise in hate crimes over the last few years. According to the FBI, in 2016, the number of hate crime incidents increased 12% from its incident rate in 2014.<sup>119</sup>

<sup>114</sup> La. Code. Jud. Con. § 3.

<sup>115</sup> La. Code. Jud. Con. § 3(A)(4).

<sup>116</sup> La. Code. Jud. Con. § 3(A)(5).

<sup>117</sup> Brian Levin & John David Reitzel, Cal. State University, San Bernadino Ctr. for the Study of Hate & Extremism, Report to the Nation: Hate Crimes Rise in the U.S. Cities and Counties in Time of Division & Foreign Interference (May 2018), [https://csbs.csusb.edu/sites/csusb\\_csbs/files/2018%20Hate%20Final%20Report%205-14.pdf](https://csbs.csusb.edu/sites/csusb_csbs/files/2018%20Hate%20Final%20Report%205-14.pdf). See also Anti-Defamation League, <https://www.adl.org/education/resources/tools-and-strategies/pyramid-of-hate-en-espanol> (last visited Mar. 9, 2019).

<sup>118</sup> *Id.*

<sup>119</sup> FBI Nat’l Press Office, FBI Releases 2017 Hate Crime Statistics, Nov. 13 2018, [www.fbi.gov/news/pressrel/press-releases/fbi-releases-2017-hate-crime-statistics](http://www.fbi.gov/news/pressrel/press-releases/fbi-releases-2017-hate-crime-statistics).

*A defendant was ordered to jail and was visibly distraught pleading with the judge even when forced physically to the back room of the court. Later, it was brought up by clerks in the court that he might have a mental disability and needed an evaluation. Before this, he was verbally and physically assaulted (manhandled) out of the courtroom.*

*- Courtwatcher comment from Municipal Court*

In 2017 (the most recent year for which the FBI has gathered statistics), that hate crime incident rate increased 31% from its rate in 2014.<sup>120</sup> Of the more than 7,100 hate crimes reported last year, nearly three out of five were motivated by race and ethnicity.<sup>121</sup> Religion and sexual orientation were the other two primary motivators in the FBI index.<sup>122</sup>

*Those appointed public defenders were also ordered to do weekly community service ‘until they found employment’ as payment for the public defender. When OPD asked why community service was given to his client, judge was abrasive and defensive in response, rude for the most part and dismissive of the defendant who was getting a “free lawyer and giving nothing back to the community.*

*- Courtwatcher comment from Criminal District Court*

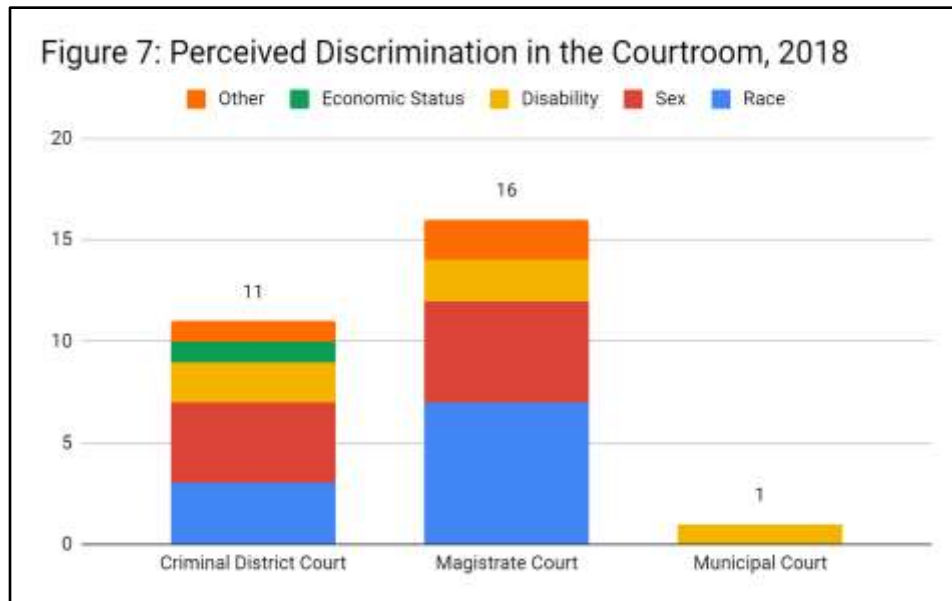
In 2018, CWN asked its observers whether the CWN observer perceived “anyone was treated inappropriately or differently based on gender, race, ethnicity, religion, age, disability status, sexual orientation, economic status.” Below is the number of incidents of perceived discrimination found in Criminal District Court, Magistrate, and Municipal Courts during 2018. The responsible actors of the perceived bias were usually judges in Criminal District Court and Magistrate Court (in 86% of observed occurrences). Targets of perceived bias were typically defendants (in 79% of observed occurrences). Figure 7 below provides a snapshot of the perceived discrimination found in the Orleans Parish criminal courtroom in 2018.

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<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*



*n* = 406 (Criminal District Court observations), 254 (Magistrate Court observations), 56 (Municipal Court observations).<sup>123</sup>

Judges should be attentive to the things they say and the actions they take in their official capacity. Often a judge's words or actions can create an impression that the public will continue to share with neighbors and other community members after they leave court. When confronted with their actions or words, a judge often responds that bias or prejudice was not their motivation in making the specific statement or taking the action. However, if a CWN observer has perceived an action or statement to be based on bias or prejudice, it is likely that other members of the public will leave the courthouse with the same impression, even if it was not the judge's intent.

**RECOMMENDATION 3: Judges should refrain from any action or statement that could give the impression of bias against a defendant or other individual in their courtroom based on gender, race, ethnicity, religion, age, disability status, sexual orientation, or economic status. Judges have the responsibility of ensuring that prejudice and bias is not tolerated by the lawyers and court staff in the judge's courtroom.**

## V. VICTIM RIGHTS

The victims' rights movement, now decades old, has become more prominent and successful in recent years. For example, in November 2018, voters in five states decided on ballot-initiated victim-rights amendments.<sup>124</sup> The strength of the victim-rights movement is growing here in Louisiana, as well. In 2018, thirty victims reached out to CWN to complain about their treatment in Orleans Parish Criminal Courts, inquire about their rights, or request that CWN monitor their case. These victims believe, as does CWN, that the activities and attitudes of all courtroom actors

<sup>123</sup> "Other" refers to one incident of discrimination between incarcerated and non-incarcerated persons, and two incidents for unknown reasons.

<sup>124</sup> Jill Lepore, *The Rise of the Victims'-Rights Movement*, *The New Yorker*, May 14, 2018, available at [www.newyorker.com/magazine/2018/05/21/the-rise-of-the-victims-rights-movement](http://www.newyorker.com/magazine/2018/05/21/the-rise-of-the-victims-rights-movement).



transform when CWN volunteers monitor a criminal case; prosecutors, judges, defense attorneys, and police all act differently when they know they are being watched.

#### A. VICTIMS IN MAGISTRATE COURT

In May 2016, CWN began monitoring Orleans Parish Magistrate Court, where pre-trial release and bail are initially determined for all state felony cases. Magistrate Court is generally effective in ensuring that pre-trial release or bail is determined within the first 48 hours of the defendant's arrest. Both probable cause and pre-trial release are determined by the Orleans Parish Magistrate Judge or an Orleans Parish Commissioner, normally after hearing arguments from both the prosecution and the defense.

In 2016, CWN commended the Orleans Parish Sheriff's Office (OPSO) for granting access to the public on all first appearances in Magistrate Court, including those held during the weekend and at night.<sup>125</sup> Members of the public were previously barred entrance to bail hearings at night and on the weekend by an OPSO deputy sheriff.<sup>126</sup> By pushing the OPSO to grant public access on nights and weekends, CWN allowed victims to observe pre-trial release and bail/bond hearings they had previously often been barred from attending.

Understandably, first appearances in Magistrate Court are important to crime victims, since it relates to the release of the defendant, which is sometimes welcomed, but often is not.<sup>127</sup> Victim rights advocates often insist that victims have the right to attend court hearings and trial, that "part of their recovery depends on their seeing—first hand, if possible—our system of justice at work."<sup>128</sup>

Since March 2018, assistant district attorneys did not appear for 14 out of 19 Magistrate Court settings. This trend continued despite the full restoration of the District Attorney's budget to its 2016 amount.<sup>129</sup> That means there is no assistant district attorney making bail arguments, speaking on the victim's behalf, or speaking to victims in Magistrate Court in more than ¾ of Magistrate Court settings. While there is no explicit legal requirement a prosecutor be present at a pre-trial release or bail hearing,<sup>130</sup> there are responsibilities prosecutors are unable to perform if they are not present at the bail hearing.

For example, without a prosecutor present in Magistrate Court, the court cannot invoke a Gwen Law hearing.<sup>131</sup> A Gwen Law hearing allows a prosecutor to incarcerate a defendant without bail

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<sup>125</sup> Ken Daley, Sheriff Ensures Easier Pub. Access to Night, Weekend Mag. Ct., Ct. Watch NOLA Says, Times-Picayune, May 17, 2016, available at [https://www.nola.com/crime/2016/05/sheriff\\_ensures\\_easier\\_public.html](https://www.nola.com/crime/2016/05/sheriff_ensures_easier_public.html).

<sup>126</sup> *Id.*

<sup>127</sup> U.S. Dept. of Just., Victim Rts., Jul. 18, 2016, available at <https://www.justice.gov/usao-edca/victim-witness-assistance/rights>.

<sup>128</sup> Jill Lepore, The Rise of the Victims'-Rts. Movement, New Yorker, May 14, 2018, available at [www.newyorker.com/magazine/2018/05/21/the-rise-of-the-victims-rights-movement](http://www.newyorker.com/magazine/2018/05/21/the-rise-of-the-victims-rights-movement).

<sup>129</sup> Michael Stein, DA to Use Most of City Budget Bump for Prosecutors, Not Diversion Program, The Lens, Nov. 20, 2018, available at <https://thelensnola.org/2018/11/20/da-to-use-most-of-city-budget-bump-for-prosecutors-not-diversion-program/>.

<sup>130</sup> La. Code Crim. Pro. § 230.2 (A).

<sup>131</sup> La. Code Crim. Pro. § 313 (B) ("Upon motion of the prosecuting attorney, the judge or magistrate may order the temporary detention of a person in custody who is charged with the commission of an offense, for a period of not more

until a hearing within five days of the first appearance<sup>132</sup> in cases in which the defendant is charged with domestic abuse battery, violation of protective orders, stalking, or any felony offense involving the use or threatened use of force or a deadly weapon upon the defendant's family member, household member, or dating partner.<sup>133</sup>

*Victims have the right to engage in the criminal justice system. Toward this right, it is important to have the district attorney present at the Magistrate Court level. Their goal should be to build relationships based on trust with the victim community and their families.*

*-Tamara Jackson, Silence is Violence Executive Director*

Often, victims do not have any contact with the District Attorney's Office until they appear in Magistrate Court.<sup>134</sup> Sometimes victims will have only spoken only to a police official if they encountered one earlier at a crime scene or at an earlier investigation, if they have even spoken to one at all.<sup>135</sup> Crime victims often have pivotal information about the defendant's likelihood of returning to court and likelihood of committing new crimes upon pre-trial release.<sup>136</sup> However, without a prosecutor in Magistrate Court to speak with, this pre-trial risk information, no matter its value, is often not transmitted to the court. The purpose of bail under the Louisiana Code of Criminal Procedure is to "ensure the presence of the defendant, as required, and the safety of any other person and the community."<sup>137</sup> One of the factors required to be considered by the judge in determining pre-trial release is "the nature and seriousness of the danger to any other person or the community that would be posed by the defendant's release."<sup>138</sup> Without the prosecutor in Magistrate Court, the victim has lost a pivotal opportunity to express whether the defendant poses a danger to them or anyone else in the larger community.

**RECOMMENDATION 4: The Orleans Parish District Attorney's Office should regularly attend and take part in all first appearance hearings in Magistrate Court. When crime victims have information that relates to the defendant's pre-trial release, the prosecutor should ensure that such information is transmitted to the Magistrate or Commissioner who is determining pre-trial release.**

## B. UNTREATED CRIME VICTIM TRAUMA

than five days, exclusive of weekends and legal holidays, pending the conducting of a contradictory bail hearing. Following the contradictory hearing, upon proof by clear and convincing evidence either that there is a substantial risk that the defendant might flee or that the defendant poses an imminent danger to any other person or the community, the judge or magistrate may order the defendant held without bail pending trial" [emphasis added]).

<sup>132</sup> This 5-day period is exclusive of weekends and legal holidays. La. Code Crim. Pro. § 313 (A)(2).

<sup>133</sup> *Id.*

<sup>134</sup> Telephone Interview with Tamara Jackson, Executive Dir., Silence is Violence (Apr. 28, 2019).

<sup>135</sup> *Id.*

<sup>136</sup> Int'l Ass'n of Chiefs of Police Victim Services Comm., Law Enforcement's Role in Supporting Victims' Needs Through pre-trial Jus. Reform (June 2015), <https://www.theiacp.org/sites/default/files/2018-08/SupportingVictimsThroughpre-trialReform.pdf>.

<sup>137</sup> La. Code Crim. Proc. Ann. art. 316.

<sup>138</sup> *Id.*

Experts in the victim advocacy field have concluded that a more effective response to the trauma of victims will reduce repeat victimization and future offending.<sup>139</sup> Ensuring that victims receive treatment enhances a victim's respect for the rule of law.<sup>140</sup> This is a simple concept but worthy of repeating: crime victims will respect the system that respects them.<sup>141</sup>

Nationally, violent crime is often highly concentrated in a small number of urban communities, and in these communities where law enforcement is often not well trusted, residents are at high risk of being victims as well as agents of violence.<sup>142</sup> Those who commit and perpetuate violent crimes often inhabit the same neighborhoods as their victims.<sup>143</sup> Additionally, law enforcement's selective targeting of areas with high (crime and) victimization elevates, just by the police attention alone, the likelihood of detecting minor transgressions (e.g., vandalism, loitering), which might go unnoticed in places with less of a police presence<sup>144</sup>

Studies have shown that exposure to trauma and post-traumatic stress disorder may increase the chances of both arrest and incarceration.<sup>145</sup> Crime victims with untreated trauma may show aggressive, retaliatory behaviors and/or engage in illicit substance use, all leading to increased rates of arrest.<sup>146</sup> It has been well documented that young men incarcerated for violent felony offenses have themselves often witnessed or been the victims of violent offenses.<sup>147</sup> However, academic studies have found that the strongest correlation to the rate of arrest was not the experience of trauma for a victim, but instead the chronic exposure to trauma.<sup>148</sup>

In New Orleans, a wide-scale study on trauma in the adult population has not been conducted, but there has been such a study examining trauma in a younger generation population. The Institute on Women and Ethnic Studies performed such a study between 2012 and 2015 on participants between the ages of 10-16.<sup>149</sup> The survey found that 54% of respondents experienced the murder of someone close to them; 39.8% of respondents witnessed a shooting, stabbing, or beating; 37.9% of respondents witnessed domestic violence; and 17.9% witnessed a murder.<sup>150</sup> Not

<sup>139</sup> Jeremy Travis, *Summoning the Superheroes: Harnessing Sci. & Passion to Create a More Effective & Humane Response to Crime: 25th Anniversary Keynote Address*, in *The Sentencing Project, To Build a Better Crim. Just. Sys.: 25 Experts Envision the Next 25 Years of Reform*, 5-13 (2012).

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* at 10.

<sup>143</sup> Mark Berg & Rolf Loeber, *Examining the Neighborhood Context of the Violent Offending-Victimization Relationship: A Prospective Investigation*, 27 *J. of Quantitative Criminology* 427 (2011).

<sup>144</sup> Jeffrey Fagan & Garth Davies, *Street Stops and Broken Windows: Terry, Race, and Disorder in N.Y. City*, 28 *Fordham Urb. L.J.* 457 (2000); Karen Parker et al., *Cmty. Characteristics and Police Search Rates*, in *Race, Ethnicity, and Profiling: New and Essential Readings* 349-67 (2010); Lawrence Sherman, *Police Crackdowns: Initial and Residual Deterrence*, 12 *Crime and Just.* 1 (1990).

<sup>145</sup> Lena Jäggi et al., *The Relationship Between Trauma, Arrest, & Incarceration Hist. Among Black Ams.: Findings from the Nat'l Survey of Am. Life*, 6 *Society and Mental Health* 187.

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> Inst. of Women & Ethnic Studs., *Emotional Wellness & Exposure to Violence Data from New Orleans Youth Age 11-15 (2015)*, available at

[static1.squarespace.com/static/5679a070c21b86984b62ab2c/t/568ad4f7df40f36749171d09/1451939063010/EWS-Report-2015.pdf](https://static1.squarespace.com/static/5679a070c21b86984b62ab2c/t/568ad4f7df40f36749171d09/1451939063010/EWS-Report-2015.pdf). N=1221, mean age = 12.89 years with 41% male, 58.1% female, and 87.3% of the sample identifying as African American.

<sup>150</sup> *Id.*

surprisingly, survey participants reported high levels of anxiety related to safety and stability: 52.2% worry about violence in their neighborhood; 14% of respondents reported feeling suicidal; 16.4% worry about having enough food to eat or a place to live; and 29.5% worry about not being loved.<sup>151</sup> Findings also indicate that exposures to violence and security-related worries are associated with the mental health outcomes of survey participants.<sup>152</sup>

As documented in Jonathan Bullington and Richard Webster's award winning *Children of Central City* series, the Centers for Disease Control and Prevention estimates that the lifetime public cost for a child exposed to violence, abuse, or neglect who does not receive adequate mental health treatment is \$210,012, taking into account future costs of the criminal justice system, healthcare, and welfare, in addition to future losses of productivity.<sup>153</sup> In January 2016-May 2017, 42 children at Lawrence D. Crocker College Prep screened positive for lifetime PTSD.<sup>154</sup> Without adequate treatment, the cost to society of these 42 children who did not receive adequate treatment is estimated to be \$8.8 million.<sup>155</sup> This cost, of course, does not include the potential loss of human life, of either the children or others that cannot be measured in dollars and cents.

CWN volunteers were asked to record the number of Magistrate Court cases in which the defendant could also potentially be considered the victim of a crime. CWN volunteers were trained to only justify their opinion based on statements made by the defendant, defense counsel, prosecution or judge. Figure 8 below identifies these defendants in 26 cases, along with the reasons why CWN volunteers perceived them to be potential victims. In 77% of cases, the defendant may have been defending him/herself from another individual, or the defendant and victim in the case may have been mutually responsible for the crime charged. In 15% of cases, the defendant may have been arrested for trespassing or attempting to steal what was rightfully the defendant's property. Lastly, in 8% of cases labelled as "other case/unknown reason" in Figure 8, the defendant may have been the victim in another open case in Magistrate Court, or the CWN volunteer did not indicate why the defendant was perceived to be a potential victim.

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<sup>151</sup> *Id.*

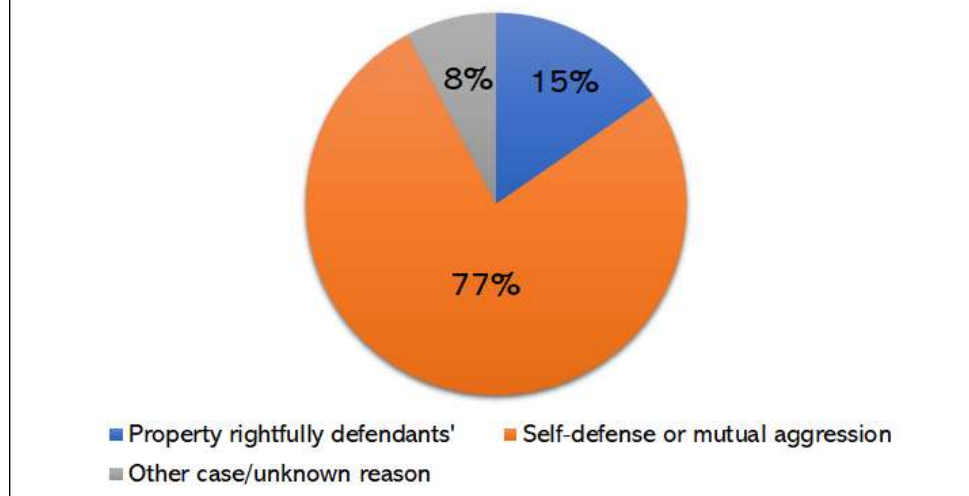
<sup>152</sup> *Id.*

<sup>153</sup> Xiangming Fang et al., Econ. Burden of Child Maltreatment in the U.S. & Implications for Prevention, 36 Child Abuse & Neglect 156 (2012), available at <https://www.sciencedirect.com/science/article/pii/S0145213411003140?via%3Dihub>.

<sup>154</sup> Richard Webster & Jonathan Bullington, Treating Trauma | The Children of Central City, Nola.com, June 14, 2018, available at <https://projects.nola.com/the-children-of-central-city/treating-trauma/>; interview with Jonathan Bullington, Investigative Rep., Nola.com (Apr. 25, 2019).

<sup>155</sup> *Id.*

**Figure 8: Reasons Defendants Could Also Be Victims, 2018**



n = 26.

In Louisiana, there was a previous prohibition against the Louisiana Crime Victim Reparation Board providing resources to any victim (except for sex crime victims) who had been convicted of a felony in the five years before becoming a victim or who is currently on probation or parole.<sup>156</sup> In 2018, thanks to the actions of the Family Justice Center, Silence is Violence, the Southern Poverty Law Center, and CWN, among others, the Louisiana Crime Victim Reparation Board was convinced to reduce that period for when a crime victim was convicted of a felony from five to three years.<sup>157</sup> According to the Crime Victim Reparations Chair, "Louisiana first started banning payouts to people with criminal history in the mid-1990s."<sup>158</sup> Often, the crime victim who is the basis of the exclusion is a formerly-convicted murder victim, the murder victim's family is subsequently denied resources for burial costs and mental health treatment to deal with the loss.<sup>159</sup> A review conducted by USA Today and the Marshall Project found that out of the 91 Louisiana victim claims that were denied solely because of a criminal history from 2015 to 2017, 80% were black crime victims or their families. The review by USA Today also found that most of those who applied for resources from the Crime Victim Reparation Board who were excluded from receiving resources because of a felony conviction were the family members of murder victims.<sup>160</sup> Louisiana House Bill 85, introduced by State representatives Billiot and Marino, would eliminate the prohibition against providing resources to crime victims and their families who have been convicted of a crime or who are currently on probation or parole.<sup>161</sup> This legislative bill keeps discretion in the hands of the Louisiana Crime Victim Reparation Board members to choose whom to allocate resources, but eliminates the discriminatory prohibition denying resources to victims with a criminal conviction.<sup>162</sup>

<sup>156</sup> Alysia Santo, For Black Crime Victims with Crim. Recs., State Help is Hard to Come by, Marshall Project & Reveal from the Ctr. for Investigative Reporting, U.S.A. Today, Sept. 13, 2018.

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

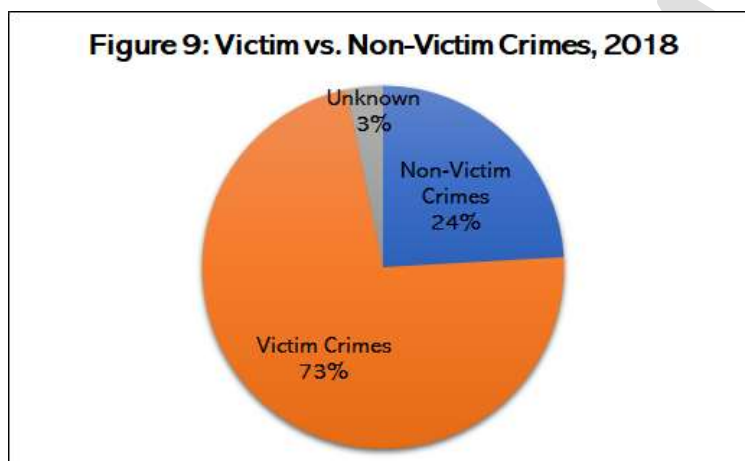
<sup>161</sup> La. Stat. Ann. § 46:1809(E).

<sup>162</sup> *Id.*

**RECOMMENDATION 5: State political leaders and the community at large should support Louisiana House Bill 85 and eliminate the discriminatory prohibition against crime victims receiving crime victim compensation when such victims have a criminal conviction, or are on probation or parole.**

### C. THE TRAUMATIZED VICTIM AND TESTIMONY IN COURT

Some crimes, such as possession of narcotics or possession of a firearm by a felon, are considered by some to be victimless or non-victim crimes.<sup>163</sup> These crimes do not have a specific victim, but are considered by some to be against the state or society at large.<sup>164</sup> In 2018, 24% of NOPD arrests were considered to be for 'victimless crime,' with 73% of NOPD arrests considered to be "victim crimes."



Source: New Orleans Police Department. n = 18,278 (victims reported), 11,317 (arrested subjects reported).

Crime victims have certain rights under Louisiana Law. These rights include reasonable notice to be present and heard during all critical stages of pre-conviction and post-conviction proceedings.<sup>165</sup> However, there are several factors that could impede a victim from appearing for a case. These factors include but are not limited to: whether the prosecutor or clerk of court gave the victim sufficient notice to appear; the level of fear or discomfort the victim has with appearing in court; witness intimidation caused by those inside court or in the victim's community; and the emotional stress and trauma in facing the victim's aggressor.<sup>166</sup> As one expert has stated,

For victims of violent crime, who may suffer from psychological trauma as the result of their victimization, involvement in the justice system may compound the original injury. The mental health needs of crime victims are often diametrically opposed to the requirements of legal proceedings. Victims need social acknowledgment and support; the court requires them to endure a public challenge to their credibility. Victims need to establish a sense of power and control over their lives;

<sup>163</sup> Brennan Hughes, *Strictly Taboo: Cultural Anthropology's Insights into Mass Incarceration & Victimless Crime*, 41 New Eng. J. on Crim. & Civ. Confinement 49, 54 (2014); Michal Buchhandler-Raphael, *Drugs, Dignity & Danger: Human Dignity as a Constitutional Constraint to Limit Overcriminalization*, 80 Tenn. L. Rev. 335 (2012).

<sup>164</sup> *Id.*

<sup>165</sup> La. Stat. Ann. § 46:1844.

<sup>166</sup> Judith Lewis Herman, *The Mental Health of Crime Victims: Impact of Legal Intervention*, 16 Journal of Traumatic Stress 159-166.



the court requires them to submit to a complex set of rules and procedures that they may not understand, and over which they have no control. Victims need an opportunity to tell their stories in their own way, in a setting of their choice; the court requires them to respond to a set of yes-or-no questions that break down any personal attempt to construct a coherent and meaningful narrative. *Victims often need to control or limit their exposure to specific reminders of the trauma; the court requires them to relive the experience by directly confronting the perpetrator* [emphasis added].<sup>167</sup>

When a crime victim is able to participate in their criminal case, participation can empower the victim.<sup>168</sup> When a victim is offered information about their case, a participatory role in the development of their case, fair and respectful treatment, emotional healing, apologies, and restitution, a victim can begin the process of healing.<sup>169</sup> Victims see the law as more fair and legitimate when they have some control over the process and feel that they have been heard.<sup>170</sup> And yet, studies on a national level involving crimes such as rape show that most rape crimes go unreported.<sup>171</sup> The majority of victims do not report the crime in the first place, and others decide not to proceed with criminal charges after reporting.<sup>172</sup> And mental health workers who serve victims commonly report the impression that their patients' traumatic symptoms are worsened by negative contacts with the justice system.<sup>173</sup>

In Louisiana, crime victims and witnesses who are under 17 years of age or who are developmentally disabled may be allowed by a judge to testify in another room outside of the court and be simultaneously televised by closed-circuit television to the court and jury.<sup>174</sup> The judge, the prosecution, the defense attorney, and a support person for the victim or witness may be present when the victim or witness testifies via closed-circuit television, but the defendant will not be present.<sup>175</sup> The child or mentally-disabled victim or witness is allowed to testify via closed-circuit television if expert testimony shows the victim or witness would likely suffer serious emotional distress and, without such simultaneous televised testimony, the protected person could not reasonably communicate their testimony to the court or jury.<sup>176</sup> A victim or witness would not be

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<sup>167</sup> Judith Lewis Herman, *The Mental Health of Crime Victims: Impact of Legal Intervention*, 16 *Journal of Traumatic Stress* 159 (2003).

<sup>168</sup> Jo-Anne Wemmers, *Where Do They Belong? Giving Victims a Place in the Criminal Justice Process*, 20 *Crim. L. Forum*, 395 (2009), (last visited Apr. 29, 2019), available at <https://doi.org/10.1007/s10609-009-9107-z> (By providing victims with the recognition that they seek and giving them, through legal counsel, a clear understanding of how the criminal justice system works, victim participation in the criminal justice process can help empower victims and combat the sense of powerlessness that many victims feel during criminal proceedings).

<sup>169</sup> Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 *U. Pa. L. Rev.* 959 (2009). Faculty Scholarship at Penn Law. 244. [https://scholarship.law.upenn.edu/faculty\\_scholarship/244](https://scholarship.law.upenn.edu/faculty_scholarship/244).

<sup>170</sup> Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 *N.Y.U. L. Rev.* 911 (2006).

<sup>171</sup> *Id.* at 153; National Sexual Violence Resource Center, *Info & Stats For Journalists*, [https://www.nsvrc.org/sites/default/files/publications\\_nsvrc\\_factsheet\\_media-packet\\_statistics-about-sexual-violence\\_0.pdf](https://www.nsvrc.org/sites/default/files/publications_nsvrc_factsheet_media-packet_statistics-about-sexual-violence_0.pdf) (last visited April 27, 2019). (Rape is the most under-reported crime; 63% of sexual assaults are not reported to police (o). Only 12% of child sexual abuse is reported to the authorities (g).)

<sup>172</sup> Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 *N.Y.U. L. Rev.* 911, 159-160 (2006).

<sup>173</sup> *Id.*

<sup>174</sup> La. Stat. Ann. § 15:283(A)(1)(2).

<sup>175</sup> La. Stat. Ann. § 15:283(B). (The defendant can consult with his attorney during the testimony of the victim or witness).

<sup>176</sup> *Id.*



able to “reasonably communicate their testimony to the court or jury,” for example, where, due to fear, the victim literally cannot get their words out while on the stand.<sup>177</sup>

Additionally, adult witnesses or victims who are developmentally disabled or dependent upon a caretaker<sup>178</sup> and children who are under 17 years old may be interviewed via pre-recorded, videotaped interviews outside the presence of the defendant or the defense counsel.<sup>179</sup> Such pre-recorded, videotaped evidence may be introduced without the witness or victim appearing in court when the victim is available to testify at the hearing or trial if called.<sup>180</sup>

*I am still haunted by the disgrace of a “trial” and the injustice of my child being forbidden to share her truth without the intimidation of her perpetrator and 10 others staring at her. My main concern is that after a hearing was had, the judge refused to decide if my daughter could testify via closed circuit tv. It was imperative per the child expert's testimony that my child was free from fear and that she was unable to share her testimony while facing her attacker. The expert also shared a heart-breaking play scenario in which my daughter used a snake figurine that she identified as her father and put it in a cage and then built a fence between her, the judge, and the assistant district attorney. The assistant district attorney had previously told my daughter that the assistant district attorney may be asking her questions in front of a judge and possibly her father, about what she said happened in private during the overnight visitation time spent with her father. My daughter became very upset at this thought and yelled “no, throw him out the room and lock the door.” However, the judge was concerned with logistics as to how a closed circuit tv would work. The defense counsel agreed to allow her to testify via closed circuit tv without her father present yet changed his mind last minute and we had to go back on our word to my daughter. I could see her anxiety grow, as my brave six-year-old still wanted her voice to be heard and understood the importance that she tell her truth to remain safe. When faced with her attacker, she had undeniable fear. She was upset and shut down during his presence, answering no and I don’t remember and verbally sharing she was nervous and scared in his presence.*

*- Anonymous Mother of a Child Victim*

CWN volunteers tracked the number of times a fragile witness/victim either testified or was asked to testify in criminal court. CWN volunteers also tracked how often such fragile witnesses were offered a confidential space within which to testify. Fragile witnesses/victims were defined for CWN volunteers as “child witnesses, witnesses with mental disabilities, or otherwise fragile or delicate situations.” A confidential space was defined as “something other than the public courtroom.” Out of a total of 7 fragile witness/victim observations, none indicated that the Judge

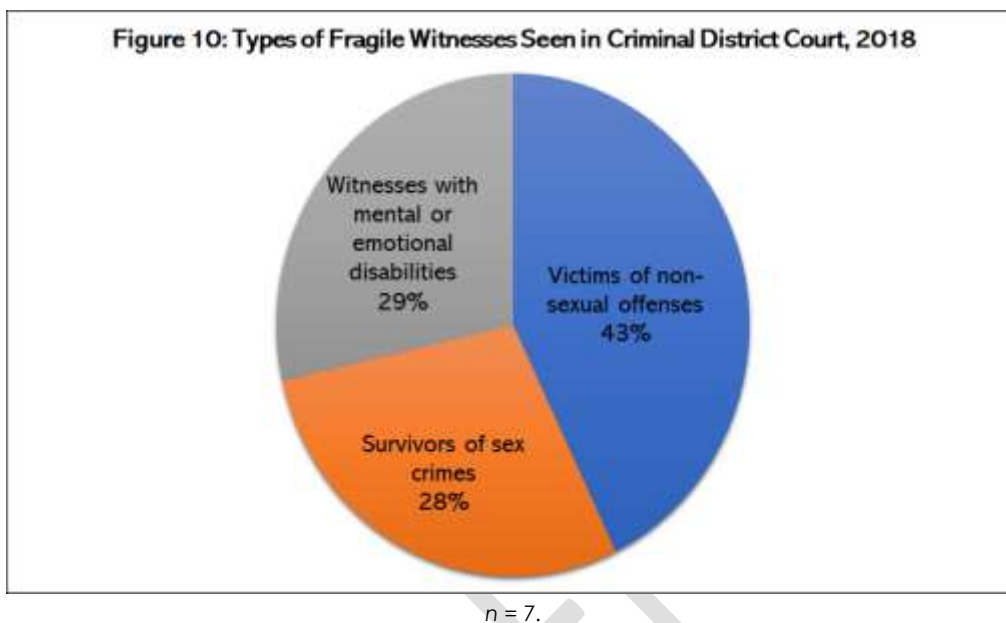
<sup>177</sup> Maryland v. Craig, 497 U.S. 836, 842 (1990).

<sup>178</sup> LA Rev Stat § 15:1503 (This includes any person who is “eighteen years of age or older, or an emancipated minor who, due to a physical, mental, or developmental disability or the infirmities of aging, is unable to manage his own resources, carry out the activities of daily living, or protect himself from abuse, neglect, or exploitation) (3) and (who cannot physically or mentally protect themselves and who are harmed or threatened with harm through action or inaction by themselves or by the individuals responsible for their care or by other parties)(A) LA Rev Stat § 15:1502 (2017).

<sup>179</sup> LA Rev Stat § 15:440.2 (2017).

<sup>180</sup> *Id.*

offered a confidential space in which the witness could testify. Fragile witnesses observed by CWN volunteers included three victims of non-sexual offenses, two survivors of sex crimes, and two witnesses with mental or emotional disabilities.



The United States Supreme Court (U.S. Supreme Court) took up the issue of victims and witnesses testifying by closed-circuit television in *Maryland v. Craig*,<sup>181</sup> finding that the witness or victim may testify outside of the physical proximity of the defendant when: (1) the denial of the face-to-face confrontation is “necessary to further an important public policy,” and (2), the “reliability of the testimony is otherwise assured.”<sup>182</sup> The court must also find that the witness or victim is traumatized and not just showing “mere nervousness or excitement or some reluctance to testify” and that such trauma was caused not by the idea of the courtroom generally, but specifically by the presence of the defendant.<sup>183</sup>

*He tried to kill me once before so how could I show my face in court against him? I would end up dead for sure.*

*-Anonymous Orleans Parish Crime Victim*

**None of the 7 fragile witnesses was offered a confidential space by the Court.**

While the *Craig* case specifically involved a child witness, there is nothing in the U.S. Supreme Court decision that limits the ability of an equally-traumatized adult victim from being able to testify via closed-circuit television if the U.S. Supreme Court's requirements of an important public

<sup>181</sup> *Maryland v. Craig*, 497 U.S. at 855 (1990).

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

policy and the failure to produce reliable testimony are met.<sup>184</sup> Where the U.S. Supreme Court has not ruled on an issue, it is up to different state courts and different state legislatures, like those in Louisiana, to decide the issue in their own jurisdiction. For example, the highest court in New York State found, “[n]owhere does *Craig* suggest that the decision is limited to child witnesses and . . . the adult sexual assault victim is able to use a one-way CCTV to further the important interest of the physical and psychological well-being of the victim and in situations where the “defendant would [have lost] his ability to re-cross examine the victim” if they could not continue their testimony.<sup>185</sup> Although the New York State case was appealed, the U.S. Supreme Court refused to hear it, a sign many saw as allowing for adult witness’ remote testimony where it was necessary to further the important public policy of shielding a traumatized witness.<sup>186</sup> Indiana,<sup>187</sup> New Jersey,<sup>188</sup> Oregon,<sup>189</sup> South Carolina,<sup>190</sup> and Wyoming,<sup>191</sup> have statutes allowing adult victims (outside of those with mental impairment) in certain situations to testify via closed circuit television.

*Victims are often conflicted about testifying in cases of domestic or sexual violence because of their history with intimidation and threats toward themselves and their families by their perpetrators. Especially mothers have to be concerned about the relationship with the fathers of their children as so often perpetrators, even after convictions, often are granted visitation rights by civil courts. These are complicated patterned crimes that often go on for years and any and all protections should be made available to victims in order for them to participate with the criminal justice system with maximum safety.*

*-Mary Claire Landry, Executive Director Family Justice Center*

The Federal Court system in Louisiana (the Fifth Circuit) has allowed remote two-way video testimony from an adult witness when the witness would suffer from “physical danger or suffering” if they were required to testify in the courtroom in front of the defendant.<sup>192</sup> That being said, federal courts offer only persuasive guidance to Louisiana State Courts on this issue; federal courts do not have jurisdiction over the Orleans Criminal District Court on this issue.<sup>193</sup> The Louisiana Supreme Court has not yet ruled on whether traumatized (but not mentally-impaired) adults should be

<sup>184</sup> Meg Garvin et al., *Allowing Adult Sexual Assault Victims to Testify at Trial via Live Video Technology*, National Crime Victim Law Institute: Violence Against Women Bulletin, (2011). See also Natalie Montell, *A New Test for Two-Way Video Testimony: Bringing Maryland v. Craig into the Technological Era*, 50 U. Louisville L. Rev. 361, 373, (2011-2012).

<sup>185</sup> *People v. Wrotten*, 923 N.E.2d 1099, 1103 (N.Y. 2009).

<sup>186</sup> Natalie Montell, *A New Test for Two-Way Video Testimony: Bringing Maryland v. Craig into the Technological Era*, 50 U. Louisville L. Rev. 361, 373, (2011-2012).

<sup>187</sup> *Closed-Circuit Televisions Statutes* § 35-37.4-6 (2012) <https://ndaa.org/wp-content/uploads/CCTV-2012.pdf>

<sup>188</sup> N.J. Coalition Against Sexual Assault, Gov. Christie OKs Closed Circuit Television Testimony for Sexual Violence Survivors, njcasa.org, <https://njcasa.org/news/gov-christie-oks-closed-circuit-television-testimony/> (last visited May 5, 2019).

<sup>189</sup> *Closed-Circuit Televisions Statutes* § 419C.025, 25 (2012).

<sup>190</sup> *Closed-Circuit Televisions Statutes* § 16-3-1550, 83 (2012).

<sup>191</sup> *Closed-Circuit Televisions Statutes* § WYO. R. CR. PROC. 26. 109 (2012).

<sup>192</sup> *Horn v. Quarterman*, 508 F.3d 306 (5th Cir. 2007). (The court found that the two way video testimony of a witness who was undergoing cancer treatment in another state was justified by the “state’s interest in protecting the witness—from trauma in child sexual abuse cases or, as here, from physical danger or suffering.”) See also *State v. Luckey*, 212 So. 3d 1220 (La. App. 5th Cir. 2017), where the reviewing court found that the “State’s interest in a slightly swifter resolution of this case” is an insufficiently important public interest to justify allowing a non-victim informant to testify via two way video from his jail cell.

<sup>193</sup> *Hamilton v. Regents of the U. of CA*, 293 U.S. 245 (1934).

allowed to testify remotely, by two-way video or closed-circuit television. Therefore, there is no controlling court decision that prohibits New Orleans Criminal Courts or discourages the Louisiana Legislature from allowing remote testimony of traumatized adult witnesses.<sup>194</sup>

The same public policy that justifies a child witness' or victims' remote testimony can justify a traumatized adult witness' or victim's remote testimony. As with child witnesses, adult witnesses who are too traumatized to testify in front of the defendant, and thus testimony cannot be elicited under cross examination, should be allowed to testify via closed-circuit television if expert testimony justifies the practice. Adult victims should also be allowed to testify if they are considered unavailable, either through mental illness, physical illness or trauma, as an exception to the hearsay rule.<sup>195</sup>

**RECOMMENDATION 6: The Louisiana State Legislature should consider amending Louisiana Statutes § 15:283 to allow an adult victim or witness to testify via simultaneous televised testimony (1) if expert testimony shows the victim or witness would likely suffer serious emotional distress, and (2) without such simultaneous televised testimony, the victim or witness could not reasonably communicate their testimony to the court or to the jury. Where possible, the Orleans Parish District Attorney should consider making a motion requesting such a traumatized adult victim or witness be able to testify via closed-circuit television if expert testimony establishes that trauma had such a debilitating effect on the victim or witness and the reliability of the victim or witness' testimony is otherwise assured.**

## VI. BAIL, FINES AND FEES

### A. THE RETURN ON INDICTMENT PROCESS

When an individual is arrested on a felony offense in Orleans Parish, they are brought to the Orleans Parish Magistrate Court for a Magistrate or a Commissioner to determine whether probable cause exists for their arrest.<sup>196</sup> At the defendant's first appearance in Magistrate Court, the Magistrate or Commissioner decides whether to detain or release them.<sup>197</sup> Typically, the

<sup>194</sup> There are cases in which the Louisiana Supreme Court or the 4th Circuit Louisiana State Court of Appeals has ruled relating to child testimony and the Craig exception or La. R.S. 15:283 (State v. Collins 65 So.3d 271 (La. App. 4th Cir. 2011)) a juvenile witness was allowed to testify via closed-circuit tv where experts found that the witness' live courtroom testimony "would be extremely traumatic and stressful for him [and] would . . . likely . . . exacerbate what appeared to be pre-existing symptoms of a post-traumatic stress disorder"; State v. Welch, 760 So.2d 317, 321 (La. 2000) the court found that the defendant's right to confrontation was violated where the court allowed a 14 year old witness to testify with a screen without the state providing either expert testimony or anything more than "a generalized statement of possible trauma for child witnesses). However, the Louisiana Supreme Court has not ruled on adult remote testimony. The only Louisiana Court to have issued a decision that partially related to this issue is the Court of Appeals for the 3rd Circuit that found that La. R.S. 15:283, does not provide procedural safeguards to protect a 17 year old witness. State v. R., Jr., 533 So.2d 1071 (1988). However, the Louisiana State Court of Appeals for the 3rd Circuit is not controlling on New Orleans Courts especially since the case was never appealed to the Louisiana Supreme Court. State v. R Jr only related to La. R.S. 15:283 and not adult remote witness testimony as a hearsay exception.

<sup>195</sup> Meg Garvin et al., *Allowing Adult Sexual Assault Victims to Testify at Trial via Live Video Technology*, in Nat'l Crime Victim Law Inst. Violence Against Women Bulletin, at 1 (2011) available at <https://law.lclark.edu/live/files/11775-allowing-adult-sexual-assault-victims-to-testify>.

<sup>196</sup> La. Code Crim. Pro. § 232 (2016); La. Code Crim. Pro. § 230.2(A) (2009).

<sup>197</sup> La. Stat. Ann. § 1346(C); La. Stat. Ann. § 1346(D); La. Stat. Ann. § 1347.

Magistrate or Commissioner determines the amount of bail required before release, and the defendant is released only if they pay that amount and agrees to certain behavioral conditions such as not getting rearrested, remaining drug free or staying away from a victim.<sup>198</sup> The Magistrate or a Commissioner can also agree to release the defendant without requiring the defendant pay cash bail or can release the defendant based on a requirement that the defendant abide by certain non-financial conditions. The Magistrate or Commissioner will make release determinations after hearing arguments from the defense and from the prosecution (if they appear) and after receiving information from the New Orleans Court Intervention Services Pre-trial Services Program. The Magistrate or Commissioner will also determine, based on the defendant's ability to pay, whether the defendant will be represented by a public defender or will be required to hire a private attorney.<sup>199</sup>

Typically, felony cases that begin in Magistrate Court continue on to the Criminal District Court for pre-trial hearings, and eventually, if a plea is not taken earlier, the case will continue on to trial proceedings.<sup>200</sup> A case in which a defendant has been charged with one or more felonies moves to Criminal District Court after a bill of information or a return on indictment (via a grand jury) is filed.<sup>201</sup> In 2018, 2% of cases passed through Magistrate Court to Criminal District Court by way of a return on indictment.<sup>202</sup> The District Attorney is required to present evidence to a grand jury for all capital cases in which a defendant faces the potential of the death penalty.<sup>203</sup> However, the district attorney can chose to bring whatever case they like to the grand jury.<sup>204</sup> If 9 of the 18 grand jurors find that there is enough evidence to believe the defendant committed a felony, the grand jury returns what is known as a "true bill."<sup>205</sup> The true bill must be filed in open court, a process referred to as the return on indictment.<sup>206</sup>

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<sup>198</sup> Definition of Bail: La. Code Crim. Pro. § 311; Behavioral Conditions: La. Code Crim. Pro. § 320.

<sup>199</sup> La. Code Crim. Pro. § 230.1 (2011).

<sup>200</sup> La. Stat. Ann. §1336(A); La. Stat. Ann. §1336(B).

<sup>201</sup> La. Code Crim. Pro. § 498.

<sup>202</sup> Response to Public Records Request from Cherie Guggenheim, Orleans Parish Dist. Att'y Public Records Officer, to Veronica Bard, CWN Deputy Director (Feb. 4, 2019) (on file with CWN).

<sup>203</sup> La. Code Crim. Pro. § 382.

<sup>204</sup> *Id.*

<sup>205</sup> La. Code Crim. Pro. § 383.

<sup>206</sup> *Id.*

**Table 2: Bill of Information vs. Grand Jury Indictment Procedure**

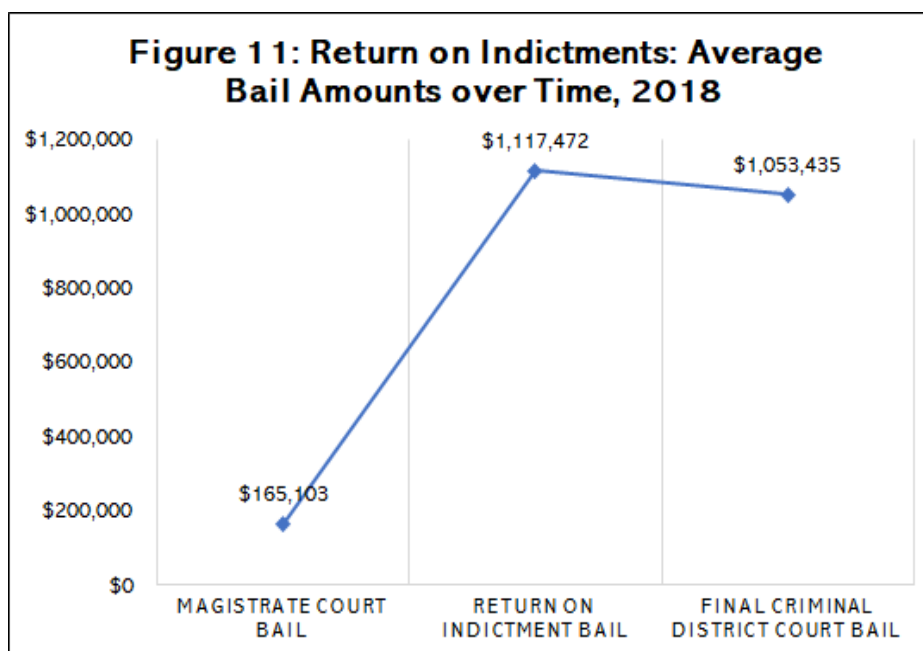
<i>BILL OF INFORMATION</i>		
<i>Magistrate Court</i> <ul style="list-style-type: none"> <li>Magistrate judge or commissioner decides whether to hold defendant in jail or release defendant on bond. ➡</li> </ul>	<i>Prosecution</i> <ul style="list-style-type: none"> <li>The District Attorney's Office accepts the case and prepares the <b>bill of information</b>. ➡</li> </ul>	<i>Criminal District Court</i> <ul style="list-style-type: none"> <li>The Assistant District Attorney files a <b>bill of information</b>.</li> </ul>
<i>GRAND JURY INDICTMENT</i>		
<i>Magistrate Court</i> <ul style="list-style-type: none"> <li>Magistrate judge or commissioner decides whether to hold defendant in jail or release defendant on bond. ➡</li> </ul>	<i>Prosecution</i> <ul style="list-style-type: none"> <li>The Assistant District Attorney presents the State's case to a confidential grand jury.</li> <li>After deliberation, the grand jury votes to <b>indict</b> the defendant of the alleged offenses. ➡</li> </ul>	<i>Criminal District Court</i> <ul style="list-style-type: none"> <li>The Assistant District Attorney files a true bill indictment at the <b>return on indictment</b> and requests that the Judge set a bail amount.</li> <li>The Judge often does not have the case file before ruling on the bail amount.</li> <li>Neither defendant nor defense counsel are notified or present.</li> </ul>

At this return on indictment, the district attorney will typically make an oral request to increase the bail at an amount greatly exceeding what was originally required of the defendant in Magistrate Court. The judge can then decide to increase bail from the amount originally set at Magistrate Court or keep the same bail conditions.

Alternatively, some defendants are not arrested before the grand jury convenes; instead the grand jury deliberates over the evidence *before* the defendant is arrested and the defendant is "charged at large"<sup>207</sup> for security or witness confidentiality reasons. When the defendant is charged at large, the defendant will be arrested for the first time after the return on indictment, appearing first in court at the Criminal District Court arraignment, and thus will not be seen in Magistrate Court at all.<sup>208</sup>

<sup>207</sup> La. Code Crim. Pro. § 496.

<sup>208</sup> *Id.*



Source: Orleans Parish District Attorney's Office and Orleans Parish Sheriff's Docket Master. N = 150.

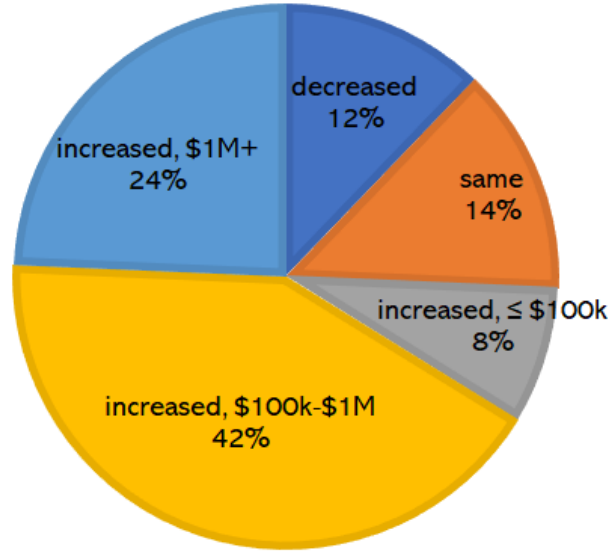
Figure 10 above illustrates a timeline of an average defendant's case where a true bill indictment was filed in 2018 and a return on indictment occurs. "Magistrate Court Bail" indicates the bail amount set by a Magistrate judge or commissioner if a defendant first appeared in Magistrate Court and is not "charged at large." The average bail amount set by the Magistrate Court was \$165,103.<sup>209</sup> When the true bill indictment was filed in Criminal District Court (the return on indictment), the defendant's bail amount increased by an average of \$952,368 during the return on indictment. The first bail amount set in Criminal District Court averaged \$1,117,472.<sup>210</sup> Thereafter, defendants' bail amounts in Criminal District Court decreased by an average of \$64,037, ultimately averaging \$1,053,435.

<sup>209</sup> The lowest bail amount set by the Magistrate Court was \$2,000 and the highest amount was \$2,205,000.

<sup>210</sup> The lowest bail amount set at the Return on Indictment was \$5,000, and the highest bail amount was \$12,000,000.



**Figure 12: Bail Change from Magistrate to Criminal District Court**



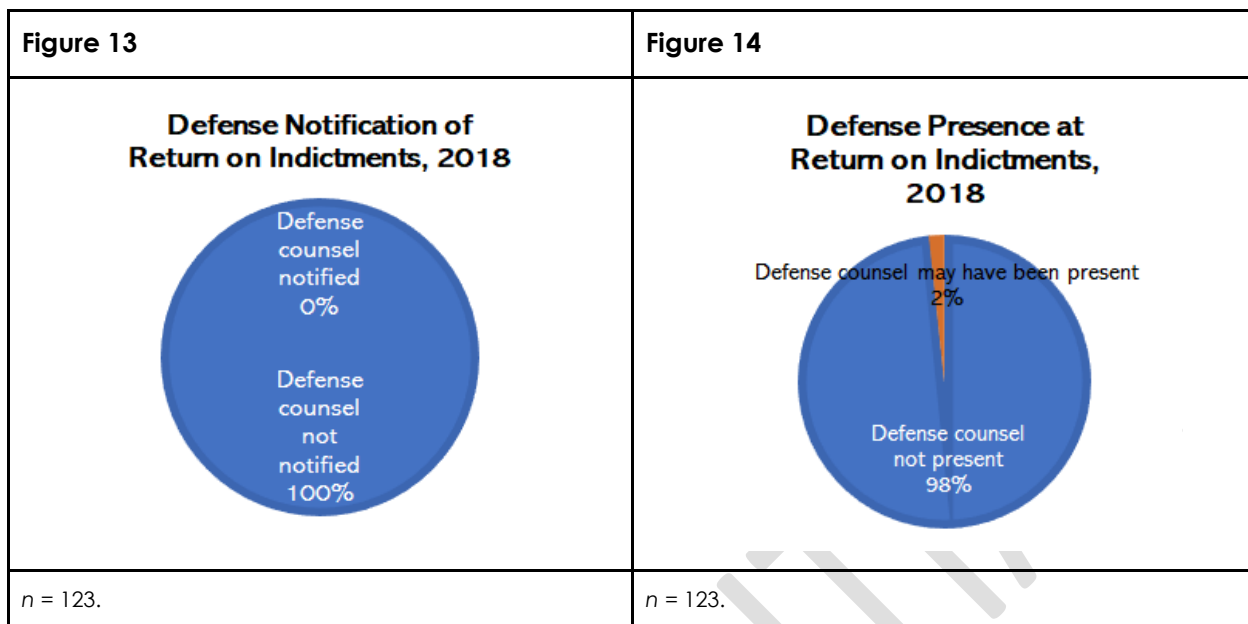
Source: Orleans Parish District Attorney's Office and Orleans Parish Sheriff's Docket Master.  $n = 74$ .

Regardless of whether the defendant is arrested before or after the grand jury convenes, it has traditionally been the practice of the District Attorney's Office, for at least 10 years, to orally argue for a bail increase without the defense attorney present, without the defendant present, and without a written motion.<sup>211</sup> While it is a requirement for all bail applications to be made in a written format, the prosecution is often allowed by the judge to make the bail increase application orally in violation of Louisiana District Court Rule 15.2.<sup>212</sup> While there is some anecdotal evidence that the district attorney's office will give select defense attorneys notice of the date for the return on indictment process,<sup>213</sup> all defense attorneys with whom CWN spoke asserted that they did not receive any notice that bail would be increased and therefore were not present at the return on indictment. Out of the 86 defense attorneys who had 151 return on indictment cases, CWN spoke to 64 defense attorneys who had 123 cases. No defense attorney with whom CWN spoke said that they had been notified of the return on indictment bail hearing, no defense attorneys said they were present at the return on indictment bail hearing, and two defense attorneys said they may have been present at the return on indictment, but could not be sure.

<sup>211</sup> Telephone Interview between Simone Levine and Defense Attorney Gary Wainright. (May 2, 2019); Telephone Interview with Derwyn Bunton, Chief Dist. Defender, Orleans Pub. Defenders (Apr. 29, 2019).

<sup>212</sup> Louisiana District Court Rule 15.2 states, "All motions, ex parte or otherwise, shall be filed with the clerk of court and served on all opposing parties, except as otherwise provided by law."

<sup>213</sup> State v. Smothers, No. 54-1785 (La. App. 4th Cir. 6/27/18).



After bail has been increased at the return on indictment proceeding, in the absence of the defendant and the defense attorney, the defense attorney and the defendant usually become aware that bail has been raised at the defendant's arraignment (which is usually the next court appearance).<sup>214</sup> Unlike the prosecution earlier, the defense will often be required to make a written motion if the defense attorney wishes to reargue the bail amount.<sup>215</sup>

Defendants who had already paid the bail set in Magistrate Court and were released pending bail are arrested and put in handcuffs by an OPSO Deputy when they appear for their arraignment, even though they may have been following all the conditions of the pre-trial release agreement made earlier in Magistrate Court.<sup>216</sup> Being placed in handcuffs may come as a complete surprise to a defendant who has been released pending bail since they had no notice bail had been increased at the return on indictment. Alternatively, if a defendant has not been able to pay their original bail set in Magistrate Court or the defendant is charged at large and arrested only after the return on indictment process, then the defendant will be faced with bail set after the indictment has been filed but without the presence of the defendant or defense counsel.<sup>217</sup>

Of course, after bail has been increased without notice to the defense, a defense attorney may file a motion to decrease bail. However, the defense attorney rarely is successful in decreasing bail once the judge has increased the bail in the defendant's and defense attorney's absence. Figure 15 shows that in 85% of 2018 indicted cases, the defendant's bail stayed at the amount where it was set during the return on indictment. Between the bail amount set by the Criminal District Court during the return on indictment and the bail set at the defendant's arraignment and

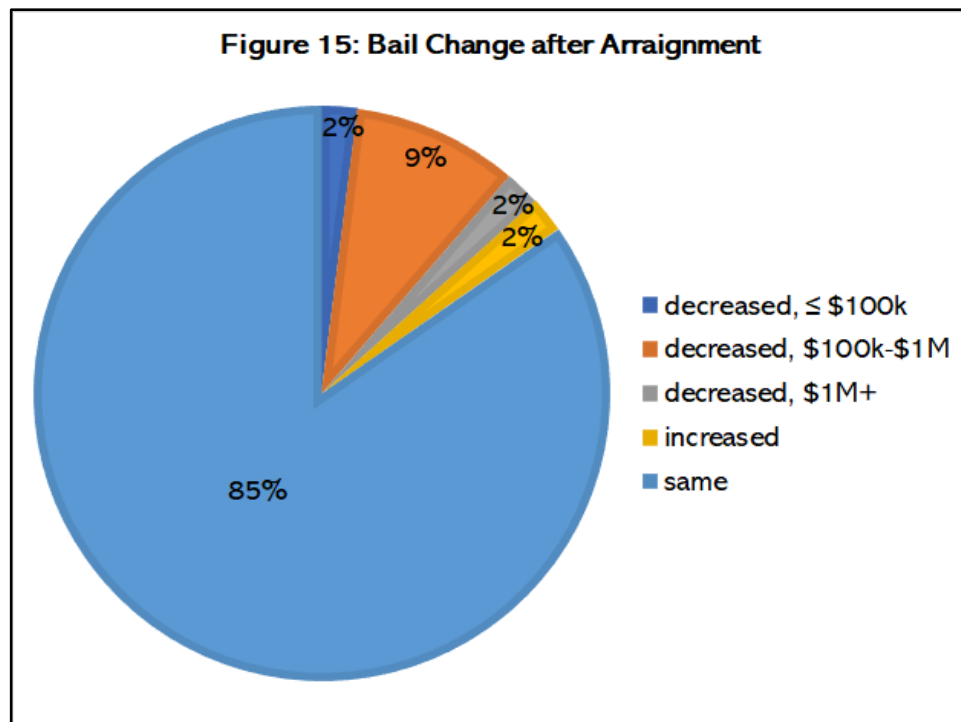
<sup>214</sup> Telephone Interview with Derwyn Bunton, Chief Dist. Defender, Orleans Pub. Defenders (Apr. 29, 2019).

<sup>215</sup> *Id.*

<sup>216</sup> *Id.*

<sup>217</sup> *State v. Smothers*, No. 54-1785 (La. App. 4th Cir. 6/27/18).

court dates thereafter, the defendant's bail only decreased by an average of \$64,037. Figure 15 below illustrates how often and by how much, bail amounts changed after the return on indictment.



Source: Orleans Parish District Attorney's Office and Orleans Parish Sheriff's Docket Master. N = 150.

The Sixth Amendment of the U.S. Constitution, the Louisiana Constitution, and the Louisiana Code of Criminal Procedure all guarantee the right to counsel.<sup>218</sup> The U.S. Supreme Court has stated,

Attachment occurs when the government has used the judicial machinery to signal a commitment to prosecute. . . Once attachment occurs, the accused is entitled to the presence of appointed counsel during any "critical stage" of the post-attachment proceedings; what makes a stage critical is what shows the need for counsel's presence.<sup>219</sup>

Once the right to counsel attaches, the accused must have counsel present at any critical stage.<sup>220</sup> A critical stage is defined as a proceeding between an individual and agents of the state that amounts to trial-like confrontations at which counsel would help the accused "in coping with legal problems or meeting his adversary."<sup>221</sup> The constitutional right to counsel is also secured by

<sup>218</sup> Alternatively, if a defendant has not been able to pay their original bail set in Magistrate Court or the defendant is (charged at large and) only arrested after the return on indictment process, then the defendant and the defense attorney will be surprised at a bail request that has been made by the district attorney, agreed to by a judge, all in the absence of the defendant and the defense attorney.

<sup>219</sup> *Rothgery v. Gillespie County*, 554 U.S. 191 (2008).

<sup>220</sup> *Id.* at 212.

<sup>221</sup> *United States v. Ash*, 413 U.S. 300, 312-313 (1973); See also *Massiah v. United States*, 377 U.S. 201 (1964).

Article I § 13 of the Louisiana Constitution, which provides that every person is entitled to counsel at "each stage of the proceedings" against him.<sup>222</sup> Louisiana Criminal Procedure dictates that "the accused in every instance has the right to defend himself and to have the assistance of counsel."<sup>223</sup>

It is also strictly prohibited for a judge to permit one party to offer "ex parte arguments or communications designed to influence his or her judicial action in any case," without the opposing party present.<sup>224</sup> The prosecution (and in fact any Louisiana lawyer) has a similar prohibition from meeting with the judge without opposing counsel present to argue for an increase in bail.<sup>225</sup> Ex parte proceedings need not be private back-room encounters between the judge and one of the parties involved in litigation, but can maintain their ex parte nature while still being conducted publicly as long as the opposing party is not present. Ex parte is defined by *Black's Law Dictionary* as,

On one side only; by or for one party; done for, on behalf of, or on the application of, one party only. A judicial proceeding, order, injunction, etc., is said to be ex parte when it is taken or granted at the instance and for the benefit of one party only, and without notice to or contestation by any person adversely interested.<sup>226</sup>

The return on indictment process regularly occurs every Wednesday or Thursday in a specifically-assigned Criminal District Court section in open court.<sup>227</sup> However, there is no set time of the day it occurs, nor would a defense attorney ever have reason to know that a specific client of theirs was going to have their bail set or increased unless given notice by the prosecutor.

The defendant should also be present in court for this proceeding if the prosecution chooses to argue for a bail increase. However, it is difficult for a defendant to make an appearance without being given notice or without being put on a jail list if the defendant is incarcerated. The U.S. Supreme Court has affirmatively stated that after the indictment, no proceedings shall be done in the absence of the accused.<sup>228</sup> The defendant's right to be present at preliminary motions can

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<sup>222</sup> La. Const. Art. I § 13. As with the federal constitutional right to counsel, the Louisiana Supreme Court has held that "a person's right to the assistance of counsel guaranteed by Article I, § 13 attaches no later than the defendant's initial appearance or first judicial hearing." *State v. Hattaway*, 621 So.2d 796, 800, 801 (La. 1993) (overruled on separate grounds by *State v. Carter*, 94-2859 (La. Nov.27, 1995), 664 So.2d 367); See also *State v. Jackson*, 27, 855 (La. App. 2 Cir. Apr. 3, 1996), 672 So.2d 215, 221 ("A person's right to the assistance of counsel attaches as early as his custodial interrogation and no later than the defendant's initial court appearance or first judicial hearing at the 72-hour mandated time.") (emphasis in original).

<sup>223</sup> La. Code Crim. Pro. § 511 (2016).

<sup>224</sup> La. Code Jud. Con. § 3(A)(6).

<sup>225</sup> Louisiana Rules of Professional Conduct 3.5 "A lawyer shall not: (b) communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order."

<sup>226</sup> What is EX PARTE? Definition of EX PARTE, *The Law Dictionary: Featuring Black's Law Dictionary Free Online Legal Dictionary* 2nd Ed. (2019), available at <https://thelawdictionary.org/ex-parte/>.

<sup>227</sup> Email from Robin LaBranch, Supervisor, Orleans Parish Clerk's Office, to Veronica Bard, Deputy Dir., Ct. Watch NOLA (May 4, 2019, 22:07 CST) (on file with author).

<sup>228</sup> *Lewis v. United States*, 13 S. Ct. 136 (1892).

be lost as a result of the defendant's misconduct,<sup>229</sup> with the defendant's consent,<sup>230</sup> to protect a witness,<sup>231</sup> or due to the defendant's voluntary absence,<sup>232</sup> none of which is the case if the defendant has not even been notified of the court proceeding.

The prosecution will often ask the judge at the return on indictment to issue a *capias* or a warrant for the defendant's arrest for failing to appear at the same proceeding for which the defendant is not given notice to appear. It is hard to understand how the defendant can be arrested on a *capias* warrant for failing to appear in court when neither the defendant nor their attorney was given notice to appear for the proceeding. Often, this *capias* warrant for the defendant's arrest is granted by the judge despite the defendant not being given notice or having any idea that the adjournment in fact occurred.<sup>233</sup> The U.S. Supreme Court has stated,

Certain pre-trial events . . . may so prejudice the outcome of the defendant's prosecution that, as a practical matter, the defendant must be represented at these events to enjoy genuinely effective assistance at trial."<sup>234</sup> The post-indictment bail hearing is one of the critical pre-trial events where the defendant must be present and represented by counsel.

**RECOMMENDATION 7: The defendant and the defense attorney must be notified and produced, respectively, for any bail argument; a bail argument should not be an ex parte proceeding. When a defendant is "charged at large," they should be arrested and brought to the arraignment proceeding where bail can be set if needed. Judges should not entertain a bail argument without the defendant and the defense attorney present; the defendant's presence can only be waived for the bail argument by their attorney or by the defendant's voluntary failure to appear.**

When a judge shows courage and insight, ensuring that the court maintains constitutional procedures, that judge should be commended by their community. Chief Judge Keva-Landrum Johnson has shown insight and courage in halting a long-standing practice that violates widely accepted constitutional norms. Judge Keva-Landrum Johnson demanded the practice of setting

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<sup>229</sup> *Snyder v. Massachusetts*, 291 U.S. 97, 106, 54 S. Ct. 330, 332-343, 78 L. Ed. 674 (1934) ("A leading principle that pervades the entire law of criminal procedure is that, after indictment found, nothing shall be done in the absence of the prisoner but that the right of being present at proceedings can be lost with the defendant's consent, the defendant's misconduct...No doubt the privilege (of personally confronting witnesses) may be lost by consent or at times even by misconduct").

<sup>230</sup> *Id.*

<sup>231</sup> *Maryland v. Craig*, 497 U.S. 836, 855 (1990).

<sup>232</sup> The Louisiana Supreme Court has also affirmatively ensured that the defendant has the right to be present at the making of a preliminary motion such as bail where they have not voluntarily waived such a right. The Supreme Court of Louisiana has recognized that "article 834 provides that the defendant has the right to be present during the making, hearing of, or ruling on a preliminary motion or application addressed to the court. But this right may be waived by the defendant or his attorney, by his voluntary absence, or his failure to object to argument or discussion during his absence." *State v. Kahey*, 436 So.2d 475, 483-84 (La.1983).

<sup>233</sup> While it can be said that the Code of Criminal Procedure Art. §332 (3) allows for the arrest of defendant where the "the court is satisfied that the bail should be increased or new or additional security required." there is a difference between a court issuing a warrant for the arrest of the defendant which is what the statute allows, as compared to a *capias* which the statute does not explicitly reference. While a *capias* is not defined by the Criminal Procedure Code, a *capias* warrant is explicitly mentioned in different parts of the code for example in La. Stat. Ann. §5599 (Fees of criminal sheriff) and RS §5601 ( Fees of the criminal sheriff for sureties for surrender of a defendant or arrest of a defendant) whereas there is no mention of a *capias* in the Code of Criminal Procedure Art. §332.

<sup>234</sup> *United States v. Ash*, 413 U. S. 300, 309-310 (1973).

bail without counsel present stop, after they had received a case in her courtroom in which the bail had already been increased by another judge at the return on indictment:

COURT: when it says the defendant is at large on bail -- and 332 states what at large on bail means -- and it gives you three things. And Mr. [REDACTED]'s does not fall within any of those three things. So there would be no reason for the state to ask the court to issue a capias for his arrest at the time of the indictment, because he is not at large on bail. And so for a representative of the state of Louisiana to stand before that judge, at the time of the indictment, and ask for a capias for this man who is on a valid bond to be arrested is a problem. And it has been an ongoing problem. And you all keep switching up why you're doing it. One day it's because we're asking for a bond modification. One day it's because we're asking for this. And it's just disingenuous and it is a problem. My third question: was the defense attorney notified when this came down?

PROSECUTION: I am not aware of that, Your Honor.

COURT: Was she notified that you all were asking for a modification in his bond?

PROSECUTION: I am not aware of that, Your Honor, other than what Miss [REDACTED] has represented in court.

COURT: So, again, this was a contradictory hearing that was held before the judge, where you all, in essence, are holding a motion to increase this gentleman's bond, without him being present or his lawyer. All a problem. All a problem. And there is a simple remedy, if you all would just do it the right way. Which is, have him served for arraignment and ask for a motion to increase his bond before me. And let me hear it. It's simple. But because the state wants to circumvent due process and do it your own way, you don't tell Judge Pittman or the judge that's taking the return all of the facts. You then ask for a motion to increase a bond without giving the gentleman a contradictory hearing, when he's represented by counsel, out on bond. And then you ask for a warrant for his arrest. All a problem. It is a problem. It's just that simple. So, let me be clear. I'm not doing a new bail order. Because the bail order is faulty. It comes under false pretenses. I am recalling the capias. He will remain on the initial bond that he made. And if you want a motion to increase a bond, you will ask for it. I will set it for a date. And I'll hear it. It's just that simple.<sup>235</sup>

Orleans Parish still has one of the highest rates of wrongful conviction in the country.<sup>236</sup> Although cases that go to grand jury and are subject to the return on indictment process are a small portion

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<sup>235</sup> Court Transcript transcribed by Stenographer Wendy Laker, Criminal District Court Section E, Case Number 541785 (June 27, 2018).

<sup>236</sup> The First 1,600 Exonerations, National Registry of Exonerations, 13-14, (last visited February 12, 2016). [http://www.law.umich.edu/special/exoneration/Documents/1600\\_Exonerations.pdf](http://www.law.umich.edu/special/exoneration/Documents/1600_Exonerations.pdf). These rankings are based on 1,600 individual exonerations from January 1989 through May 18, 2015. Additionally, the National Registry of Exonerations reported, "A few large and medium sized counties have exoneration rates per capita 5 to 10 times the national average: Orleans Parish, Louisiana; Suffolk County, Massachusetts; Kern County, California; and Jefferson Parish, Louisiana."

of the overall felony cases in Criminal District Court, these cases are some of the most serious felonies for which defendants, if convicted, will serve longer sentences and may end up on death row. National studies have found that when a defendant is incarcerated, they are more likely to plead guilty.<sup>237</sup> It is exactly these more serious cases where the Orleans Parish Criminal Court needs to be extra vigilant in ensuring that the defendant's constitutional rights are not violated. Judge Landrum-Johnson has spoken to and convinced other judges to change their practices regarding returns on indictments, and she has been transparent with the public about the practice and her views on the practice.

**Commendation 1: CWN commends Chief Judge Landrum-Johnson for ensuring constitutional rights are upheld in her court during the return on indictment process. She has been courageous in prohibiting an unsound practice from continuing in her courtroom, persuasive of others on the bench to abide by the Constitution, and transparent with the public.**

## B. MUNICIPAL COURT BAIL REFORM

In January 2017, the New Orleans City Council passed comprehensive bail reform for all municipal (city) offenses. Municipal offenses are criminal statutes passed by the City Council, signed by the Mayor into law, and promulgated in the New Orleans City Criminal Code. These are offenses for which a defendant can serve up to a maximum of 8 months in jail,<sup>238</sup> which is less serious than the maximum a defendant could serve on a state misdemeanor<sup>239</sup> and less serious than what a defendant could serve on a state felony.<sup>240</sup> Typical offenses seen in Municipal Court include trespass,<sup>241</sup> illegal carrying of a weapon,<sup>242</sup> and disturbing the peace.<sup>243</sup>

The municipal bail reform statute requires that a defendant charged only with municipal offenses and having no warrants<sup>244</sup> or additional pending cases be released on their own recognizance (with no bail)<sup>245</sup> unless the defendant is charged with one of five offenses: (1) municipal battery, (2) assault, (3) illegal carrying of a weapon, (4) impersonating a peace officer, or (5) domestic violence.<sup>246</sup> If the defendant is charged with one of those five offenses, the "court must determine whether there is a substantial risk that the defendant may flee or poses an imminent danger to any other person or the community."<sup>247</sup> If there is no finding of flight or danger, the court must

<sup>237</sup> In one study, examining felony and misdemeanor cases in Philadelphia between September 2006 and February 2013, pre-trial detention was associated with a 13% increase in the defendant being convicted which was "largely explained by an increase in guilty pleas among defendants who otherwise would have been acquitted or had their charges dropped." Megan T Stevenson, *Distortion of Justice: How the Inability to Pay Bail Affects Case Outcomes*, *The Journal of Law, Economics, and Organization*, (November 2018), 34, 4, 511–542 <https://doi.org/10.1093/jleo/ewy019>.

<sup>238</sup> [Library.municode.com](https://library.municode.com/la/new_orleans/codes/code_of_ordinances?nodeId=PTIICO_CH54CRCO_ARTIINGE_S54-23BA). (2019). Municode Library. available at [https://library.municode.com/la/new\\_orleans/codes/code\\_of\\_ordinances?nodeId=PTIICO\\_CH54CRCO\\_ARTIINGE\\_S54-23BA](https://library.municode.com/la/new_orleans/codes/code_of_ordinances?nodeId=PTIICO_CH54CRCO_ARTIINGE_S54-23BA).

<sup>239</sup> La. Code Crim. Pro. § 933.

<sup>240</sup> *Id.*

<sup>241</sup> New Orleans, La., Code § 54-153 (2019).

<sup>242</sup> *Id.* § 54-341.

<sup>243</sup> *Id.* § 54-403.

<sup>244</sup> *Id.* § 54-23.

<sup>245</sup> *Id.* § 54-23(c).

<sup>246</sup> *Id.* § 54-23(d).

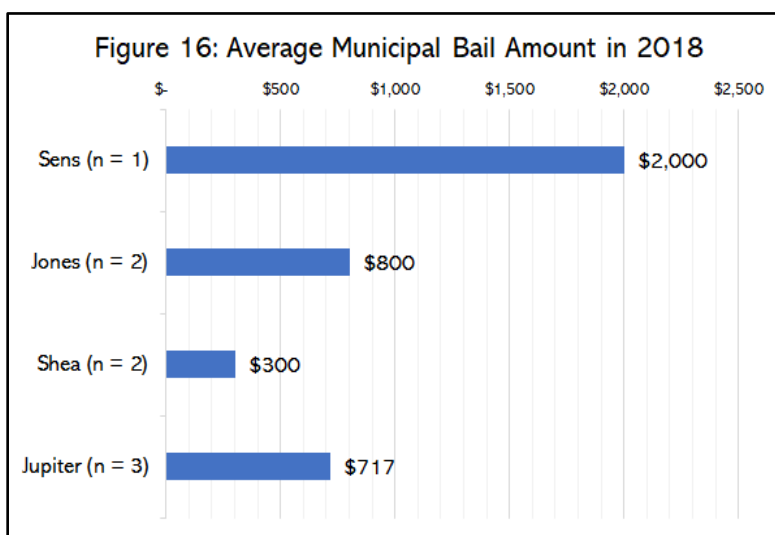
<sup>247</sup> *Id.* § 54-23(e).



release the defendant with no bail.<sup>248</sup> Where there is a court determination of a risk of flight or danger to another person or the community, the court must impose "the least restrictive non-financial release conditions," such as peace bonds, stay away orders, and protective orders.<sup>249</sup> If a bond is set, it cannot be more than \$2,500,<sup>250</sup> and the court must inquire into the defendant's ability to pay.<sup>251</sup> The judge is required to state the reasons why the court has imposed bail or pre-trial release requirements.<sup>252</sup>

Although there was a great deal of attention paid to the negotiation and passage of the municipal misdemeanor bail reform measures, there has been a dearth of attention relating to judicial compliance with the bail reform statute. CWN has monitored municipal bail hearings in Municipal Court since late 2016. This has been a challenging court for CWN volunteers to observe, as judges frequently change the time they will start the court session, usually delaying the court, but on occasion starting court earlier than the 11 am time period the Municipal Court judges have previously advised bail hearings would begin.<sup>253</sup> That being said, CWN volunteers observed the court 146 times and observed 3,163 case appearances in 2018.

CWN is pleased to report that in the case sample CWN assessed, that Municipal Court showed full compliance with the new municipal bail statute. Out of the of 109 cases it reviewed in which defendants were eligible to be released on their own recognizance ("ROR") under the municipal bail statute, defendants in only 8 cases were not released ROR and were ordered to pay bail. Where bail was set, bail was set consistent with the municipal bail law. The average bail amount ordered per judge for all municipal cases is set forth in Figure 16 below.



Source: Municipal Court of New Orleans Clerk of Court's Office; CWN data. n = 8.

<sup>248</sup> *Id.* § 54-23(e)(1).

<sup>249</sup> *Id.* § 54-23 (e)(2)(i).

<sup>250</sup> *Id.* § 54-23 (e)(2)(ii).

<sup>251</sup> *Id.*

<sup>252</sup> *Id.* § 54-23(e)(3).

<sup>253</sup> Interview with Paul Sens, Chief Judge, Mun. & Traffic Ct. of New Orleans (Mar. 21, 2018).

### C. DRUG TEST AND OTHER COURT FEES

Many observers have concluded that a user-pay system, in which criminal defendants are required to pay court fines and fees to financially maintain the court system, poses more problems than it offers solutions.<sup>254</sup> A consensus has been reached that courts should not impose fees upon those least able to afford it.<sup>255</sup> In Louisiana, there have already been two class action suits against the user-pay system.

One civil rights action has been brought against the Governor of Louisiana for insufficiently resourcing Louisiana public defenders' offices through a user-pay system.<sup>256</sup> The other civil rights suit was brought originally against the Orleans Parish District Court Judges, the Orleans Parish Clerk, the Orleans Parish Sheriff's Office, the City of New Orleans, the Judicial Administrator, and Magistrate Cantrell over the practice of funding court operations, in part with fines and fees levied on mainly poor defendants.<sup>257</sup> By December 2017, other defendants were dismissed from the action and only the Judges were left as responsible defendants in the lawsuit.<sup>258</sup> In this case, plaintiffs questioned the overuse and the cost of the collections department whose purpose it was to collect the fines and fees<sup>259</sup> from the criminal defendant population, which was then assessed to be 95% indigent defendants.<sup>260</sup> Before the lawsuit, the Collections Department used to issue warrants for the arrest of these defendants if the payments had not been satisfied.<sup>261</sup> While the judges later took the power away from the collections department to issue warrants that would lead to the arrest of defendants for nonpayment, it is important to note that in 2014, the cost of the collections department was \$90,554.<sup>262</sup> By 2018, the cost of the Collections Department cost had increased to \$133,997.<sup>263</sup>

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<sup>254</sup> Crim. Jus. Pol. Program, Harvard Law School, *Confronting Crim. Just. Debt: A Guide for Policy Reform*, page 22 (2016) ("A yearlong NPR investigation found that the costs of the criminal justice system in the United States are paid increasingly by the defendants and offenders. It's a practice that causes the poor to face harsher treatment than others who commit identical crimes and can afford to pay. Some judges and politicians fear the trend has gone too far").

<sup>255</sup> *Id.* at 25.

<sup>256</sup> Southern Poverty Law Center, Ct. Certifies Class Action in SPLC Lawsuit Against La's Pub. Defender Sys. (Aug. 28, 2018), <https://www.splcenter.org/news/2018/08/28/court-certifies-class-action-splc-lawsuit-against-louisiana%E2%80%99s-public-defender-system>.

<sup>257</sup> Cain v. City of New Orleans, 15-4479 (E.D. La. 12/2/15).

<sup>258</sup> Matt Sledge, Orleans Judges Say They Have Waived \$1M in Court Fees in Response to "Debtors' Prison" Lawsuit, *The Advocate*, June 25, 2017,

[https://www.theadvocate.com/new\\_orleans/news/courts/article\\_54e60ffa-5833-11e7-87be-e700e5498301.html](https://www.theadvocate.com/new_orleans/news/courts/article_54e60ffa-5833-11e7-87be-e700e5498301.html).

<sup>259</sup> Cain, 15-4479 (Second Am. Class Action Comp. ¶ 41) ("Collections Agents are responsible for collecting fines and fees imposed as well as tracking down defendants who have failed to meet the conditions of their sentence. Inclusive of those duties are reconciling accounts, providing courts with the status of defendants' accounts and processing warrants on delinquent accounts.").

<sup>260</sup> Ken Daley, Judgment Asked in "Debtors' Prison" Lawsuit Against New Orleans Criminal Court Judges, *The Times-Picayune*, June 21, 2017, available at [https://www.nola.com/crime/2017/06/judgment\\_asked\\_in\\_debtors\\_pris.html](https://www.nola.com/crime/2017/06/judgment_asked_in_debtors_pris.html). At a City Council meeting, Judge Zibilich noted that nearly 95% of the criminal defendants in OPCDC cannot afford an attorney, and stated: "If they can't afford an attorney, just imagine how difficult it's going to be for us to have to chase them around the block to try to get money from them." *Id.*

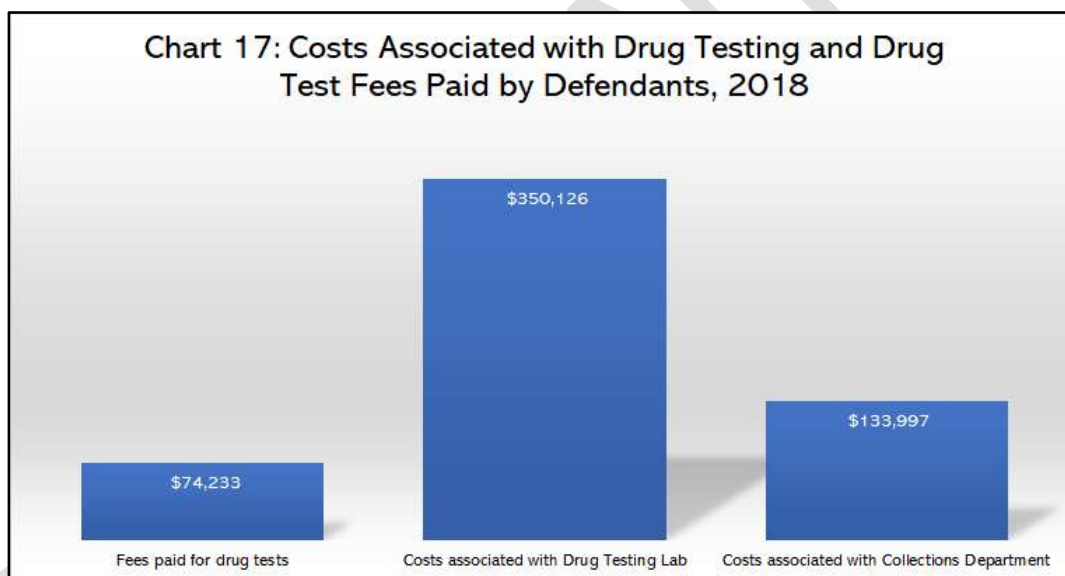
<sup>261</sup> Cain, 15-4479 (Second Am. Class Action Comp. ¶¶ 110-22).

<sup>262</sup> Cain, 15-4479 (Exs. in Supp. of Summ. J., Ex. 8 (noting that collections department for OPCDC employed 3 people as of June 2014, with a combined salary amount of \$90,554)).

<sup>263</sup> Response to Public Records Request from Robert Kazik, Jud. Adm'r, Orleans Parish Crim. Dist. Ct., to Veronica Bard, Deputy Dir., Ct. Watch NOLA (Apr. 25, 2019) (on file with CWN).

The lawsuit against the Orleans Parish Judges and Judicial Administrator did not primarily relate to the costs defendants were required to pay when forced to take drug tests as a condition of their bail or pre-trial release.<sup>264</sup> According to the Judicial Administrator, drug test fines are never paid into the Judicial Expense Fund, but instead used to fund the drug testing facility in the court.<sup>265</sup> Defendants are expected to pay for non-diversion program drug tests before they take the drug test.<sup>266</sup> However, if the defendant informs the collections department that they are unable to pay the drug test fee the day of the test, the cost of the drug fee will be added to the “defendant's bill,” which the defendant will be required to pay at the end of their case.<sup>267</sup> According to the Judicial Administrator, the Court will not search for or arrest a defendant who failed to pay their outstanding bill for drug tests fees.<sup>268</sup>

In 2018, the cost of the drug testing facility inside the court was \$350,126, an amount which does not include the one-time cost of the construction of the office itself. In 2018, the cost of the Collections Department staffing was \$133,996.80.<sup>269</sup> Defendants paid \$74,233 for drug testing fees in 2018.<sup>270</sup> Drug tests for Orleans Parish-based defendants cost \$10 each; drug tests for out-of-town individuals cost \$25 each.<sup>271</sup>



Source: Orleans Criminal District Court Judicial Administrator's Office.

<sup>264</sup> Telephone Interview with Alec Karakatsanis, Exec. Director, Civil Rights Corps, (Apr. 8, 2019); Telephone Interview with Eric Foley, Staff Attorney, MacArthur Justice Center (Apr. 10, 2019).

<sup>265</sup> Telephone Interview with Robert Kazik, Jud. Adm'r, Orleans Parish Crim. Dist. Ct. (May 13, 2019).

<sup>266</sup> *Id.*

<sup>267</sup> *Id.* at 247.

<sup>268</sup> *Id.*

<sup>269</sup> Interview with Robert Kazik, Jud. Adm'r, Orleans Parish Crim. Dist. Ct. (Apr. 15, 2019). The Collections Department is required to collect all court fines and fees, not just drug test fees.

<sup>270</sup> Response to Public Records Request from Robert Kazik, Jud. Adm'r, Orleans Parish Crim. Dist. Ct., to Veronica Bard, Deputy Dir., Ct. Watch NOLA (Feb. 19, 2019) (on file with CWN).

<sup>271</sup> Orleans Crim. Dist. Ct., Drug Testing, <http://www.criminalcourt.org/drug-testing.html> (last visited May 1, 2019).

Increasingly, experts are asking whether the collection of court fees makes financial sense.<sup>272</sup> As the Criminal Justice Program at Harvard University has stated,

In addition to these profound consequences for the fairness of the legal system, policies for imposing and enforcing criminal justice debt often do not make financial sense. One of the reasons for the proliferation of criminal justice debt is the perception by many policymakers at all levels of government that financial sanctions are necessary to fund the criminal justice system. . . . As a result, even from a purely fiscal perspective, criminal justice debt may not provide jurisdictions with net economic benefits. Moreover, as a method of funding government, fines and fees act as a regressive tax, with those who can least afford to pay facing the greatest liabilities.<sup>273</sup>

In fact, the user-pay system poses a constant dilemma for the public officials who depend on it, as well as for the citizens of New Orleans. The federal courts have found it unconstitutional to jail a defendant unable to pay a court fee, but if the court is unable to pay for services such as drug testing, then it is City Council, and inevitably the citizens of New Orleans, who must bear this cost.<sup>274</sup> It is clear then why payment for the costs of this collections department has traditionally been considered a priority for City Council:<sup>275</sup> If poor criminal defendants cannot pay their fees, we as citizens do. Increasingly experts have started to push judges to question whether certain actions and services that would initially cost indigent users, but later cost taxpayers (when the indigent court users are unable to pay), are in fact worth the cost.<sup>276</sup> One of the main questions a judge should ask is what the larger objective is for the court's drug testing requirement.<sup>277</sup> This is especially true when the criminal case for which the defendant is charged neither relates to drugs, nor is there strong evidence of a defendant's drug abuse.<sup>278</sup>

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<sup>272</sup> Valeriya Melta, *Debtor's Prison*, Law Street Media (Jun. 4, 2015), <https://lawstreetmedia.com/issues/law-and-politics/debtor-s-prison-criminal-justice-fees-fines-affect-vulnerable-us/> ("The current system of fines and fees isn't saving money or raising revenue for the states because it requires vast resources to maintain and support clerks, attorneys, judges, and probation officers, all those who collect fees and fines from offenders").

<sup>273</sup> Crim. Jus. Pol. Program, Harvard Law School, *Confronting Crim. Just. Debt: A Guide for Policy Reform*, page 2 (2016).

<sup>274</sup> Cain, 15-4479 (Second Am. Class Action Comp. ¶ 157).

<sup>275</sup> *Id.* ("Consistent with its (City council's) perennial concern, the Council questioned the judges about why they had collected only 52% of the money assessed. Several minutes after the discussion about this lawsuit and its allegations of flagrant violations by the Collections Department, the Council and OPCDC representatives confirmed that the Council had granted their request for a \$92,831 funding increase for the next year to hire two additional Collections Agents. OPCDC confirmed that this increase for the Collections Department came after private meetings with the Council and was actually "the only increase that we received after meetings with you.").

<sup>276</sup> *Id.* at 25.

<sup>277</sup> Telephone Interview with Lisa Foster, Co-Director, Fines and Fees Justice Ctr. (Apr. 16, 2019).

<sup>278</sup> *Id.*

*Drug testing people pre-trial when there is no nexus to their alleged offense is unfair, harmful, and of dubious constitutionality. Why should a person who has not been convicted of any crime - let alone a drug offense - be forced to pay for constant drug testing? Not surprisingly, all over the country - even when a person is on probation - lawsuits challenging routine drug-testing have been successfully challenged.*

*-Judge Lisa Foster, Former Director of the Office for Access to Justice at the U.S. Department of Justice & Current Co-Director of the Fines & Fees Justice Center*

In a series of civil right cases where private and public departments of probation were challenged for requiring drug testing, the judicial decisions required that drug testing as a condition of probation be “reasonably related to the rehabilitation of the defendant.”<sup>279</sup> While the drug testing of defendants released pending trial is different from the conditions required of those already convicted and released on probation, the pre-trial criminal defendant has even more rights than the convicted defendant, including freedom from search and seizure and the protections of privacy in their bodily function.<sup>280</sup> This is even a greater reason why judges should carefully question the need for drug testing in individual cases. If the larger purpose of drug testing is to keep New Orleans citizens safe in their person and in their home, judges should ask themselves how drug testing is helping to solve that problem.<sup>281</sup>

## VII. INCARCERATION AND OTHER SANCTIONS

### A. CONTEMPT

A judge has the power to fine or imprison a person for contempt of court if, broadly speaking, the individual does not comply with the court's lawful order.<sup>282</sup> Anyone who appears in front of the court can be held in contempt, including but not limited to a criminal defendant, witness, victim, defense attorney, or prosecutor.<sup>283</sup> According to the Louisiana Criminal Code, Contempt of Court is “an act or omission tending to obstruct or interfere with the orderly administration of justice, or to impair the dignity of the court or respect for its authority.”<sup>284</sup> Contempt includes, in relevant part,

<sup>279</sup> United States v. Tonry, 605 F. Supp. 144, 149-50 (5th Cir. 1979); United States v. Williams, 787 F.2d. 1182, 1185 (1986); See also U.S. Dep't of Justice, Nat'l Inst. of Corrections, Legal Issues in Drug Testing Probation and Parole Clients and Employees, available at <https://www.ncjrs.gov/pdffiles1/Digitization/121383NCJRS.pdf>. In fact, in Louisiana cases, conditions of probation not reasonably related to the rehabilitation of the defendant have been struck down. State v. Labure, 427 So.2d 855 (La. 1983); State v. Carey, 392 So.2d 443, 444 (La. 1981); State v. Spano, 380 So.2d 620 (La. 1980); State v. Sartain, 571 So.2d 192 (La. App. 4 Cir. 1990); State v. Morgan, 459 So.2d 6 (La. App. 1 Cir 1984), writ denied 462 So.2d 1263 (La. 1985); State v. Thomas, 428 So.2d 950 (La. App. 1 Cir. 1983); State v. Hammonds, 434 So. 2d 452 (La. App. 2 Cir 1983).

<sup>280</sup> Griffin v. Wisconsin, 483 U.S. 868, 873 (1987) (Blackmun, J., concurring in judgement) (quoting New Jersey v. T.L.O., 469 U.S. 325, 351 (1985)).

<sup>281</sup> Telephone Interview with Lisa Foster.

<sup>282</sup> La. Code Crim. Pro. art. 17.

<sup>283</sup> Id. arts. 21, 23 (“Direct contempt” and “Constructive contempt,” respectively).

<sup>284</sup> There are two different types of contempt of court: direct contempt and constructive contempt. LA Code Crim Pro 21; Direct contempt is an act “committed in the immediate view and presence of the court and of which it (the court) has personal knowledge,” and constructive contempt is any contempt that is not a direct contempt. LA Code Crim Pro 23.

any willful disobedience of any lawful judgment, order, mandate, writ, or process of court."<sup>285</sup> A contempt of court proceeding is criminal when the court seeks to punish a person for disobeying a court order.<sup>286</sup> However, in order to constitute the willful disobedience necessary for criminal contempt, the act or refusal to act must be engaged in with an intent to defy the authority of the court.<sup>287</sup> Additionally, the defendant has due process rights under the Fourteenth Amendment that require there be "proof beyond a reasonable doubt of every fact necessary to constitute the crime of contempt for which he is charged."<sup>288</sup> Where contempt cases are appealed, they are appealed on an abuse of discretion standard.<sup>289</sup>

CWN examined two different instances of contempt in criminal district court: one where the judge held a criminal defendant in contempt for failing to hire a private criminal defense attorney and the other for failing a court-administered drug test.

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## 1. CONTEMPT FOR FAILURE TO HIRE A PRIVATE ATTORNEY

The Sixth Amendment of the U.S. Constitution requires that a criminal defendant be appointed an attorney if they cannot afford to hire one.<sup>290</sup> In Louisiana, the procedure by which it is determined whether a defendant must hire a private attorney or will be appointed a public defender is a comprehensive process established in Revised Statute §15:175 which states, in part:

A(1)(b) A person will be deemed "indigent" who is unable, without substantial financial hardship to himself or to his dependents, to obtain competent, qualified legal representation on his own. "Substantial financial hardship" is presumptively determined to include all defendants who receive public assistance, such as Food Stamps, Temporary Assistance for Needy Families, Medicaid, Disability Insurance, resides in public housing, or earns less than two hundred percent of the Federal Poverty Guideline. A defendant is presumed to have a substantial financial hardship if he or she is currently serving a sentence in a correctional institution or is housed in a mental health facility. (c) Defendants not falling below the presumptive threshold will be subjected to a more rigorous screening process to determine if their particular circumstances, including seriousness of the charges being faced, monthly expenses, local private counsel rates, would result in a "substantial hardship" were they to seek to retain private counsel.

B(1) In determining whether or not a person is indigent and entitled to the appointment of counsel, the court shall consider whether the person is a needy person and the extent of his ability to pay. The court may consider such factors as

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<sup>285</sup> This definition specifically relates to constructive contempt. *State in Interest of R.J.S.*, 493 So. 2d 1199, 1202-03 (La. 1986); La. Code Crim. Pro. art. 23(2).

<sup>286</sup> *Interest of R.J.S.*, 493 So.2d at 1202 & n.7. Contempt is punishable by a fine of not more than five hundred dollars, or by imprisonment for not more than six months or both. For an attorney (as compared to a non-attorney), the fine is limited to one hundred dollars, and imprisonment to twenty-four hours. La. Code Crim. Pro. art. 25 ("Penalties for contempt").

<sup>287</sup> *Billiot v. Billiot*, 805 So. 2d 1170, 1174 (La. 2002).

<sup>288</sup> *In re Winship*, 397 U.S. 358 (1970).

<sup>289</sup> *Green v. United States*, 356 U.S. 165, 188 (1958) (overturned on other grounds).

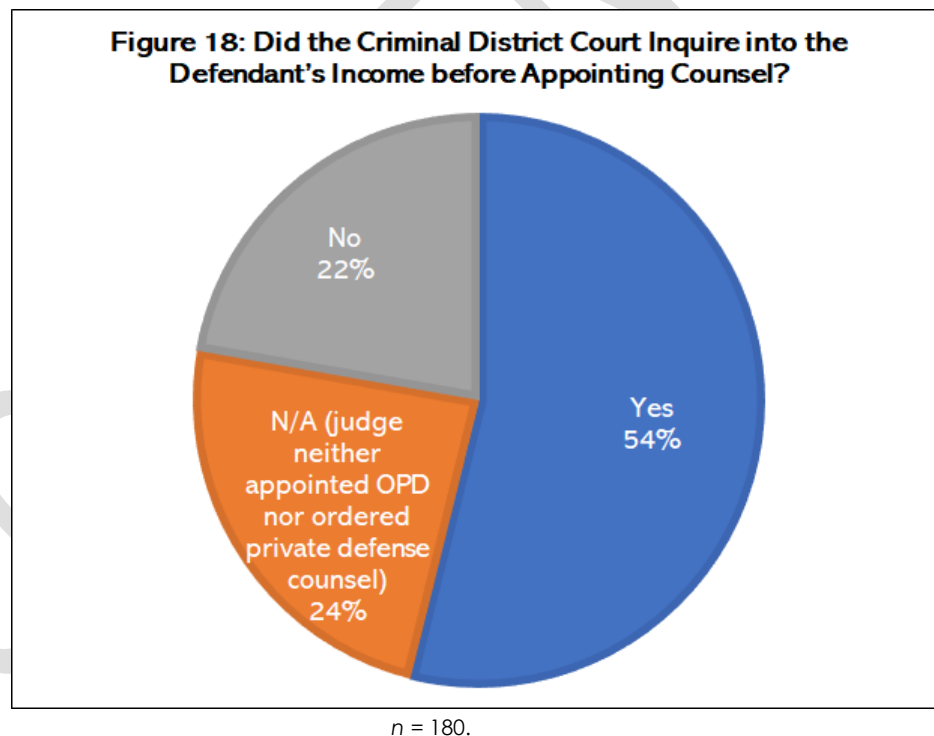
<sup>290</sup> U.S. Const. amend. XI.

income or funds from employment or any other source, including public assistance, to which the accused is entitled, property owned by the accused or in which he has an economic interest, outstanding obligations, the number and ages of dependents, employment and job training history, and level of education.

**(2) Release on bail alone shall not disqualify a person for appointment of counsel.**

In each case, the person subject to the penalty of perjury shall certify in writing such material factors relating to his ability to pay as the court prescribes [emphasis added].<sup>291</sup>

Clearly, it is an intricate and involved process to determine when a criminal defendant is allowed a public defender and when the defendant is required to hire a private defense attorney. The Orleans Public Defenders Office represented 85% of criminal defendants in 2018.<sup>292</sup> However, the Orleans Public Defenders has traditionally reported having an insufficient amount of resources to constitutionally represent all the criminal defendants they are required to represent. While it is a public policy priority to ensure that only those who qualify as indigent receive a public defender, the adverse is also true: those who are indigent should not be forced to hire a private defense attorney.



Some Orleans Parish Criminal District judges require a criminal defendant to fill out a declaration

<sup>291</sup> La. Rev. Stat. Ann. §15:175.

<sup>292</sup> E-mail from Lindsey Hortenstine, Dir. of Comms. & Dev., Orleans Pub. Defenders, to Simone Levine, Executive Dir. & Veronica Bard, Deputy Dir., Ct. Watch NOLA (Apr. 12, 2019, 09:54:00 CST).



form that includes questions relating to the defendant's financial status.<sup>293</sup> Other judges ask the defendant specific financial status questions, which the defendant is required to answer orally. While the Criminal Procedure code prohibits a judge from requiring a criminal defendant to hire private counsel based solely on the defendant's release on bail, some judges still required a defendant to hire a private defense attorney solely because the defendant has made bail in 2018. CWN did not collect data in Magistrate Court relating to whether judges required defendants to hire private defense attorneys based solely on the defendant paying their bail. However, CWN has observed court paperwork establishing that this practice regularly occurs in Magistrate Court. CWN volunteers have witnessed the following judges require a criminal defendant to hire a private defense attorney based solely on whether they pay bail and are released: Judge Derbigny (two cases); Judge White (one case); Judge Landrum-Johnson (one case); Bonin (one case); Judge Zibilich (one case).

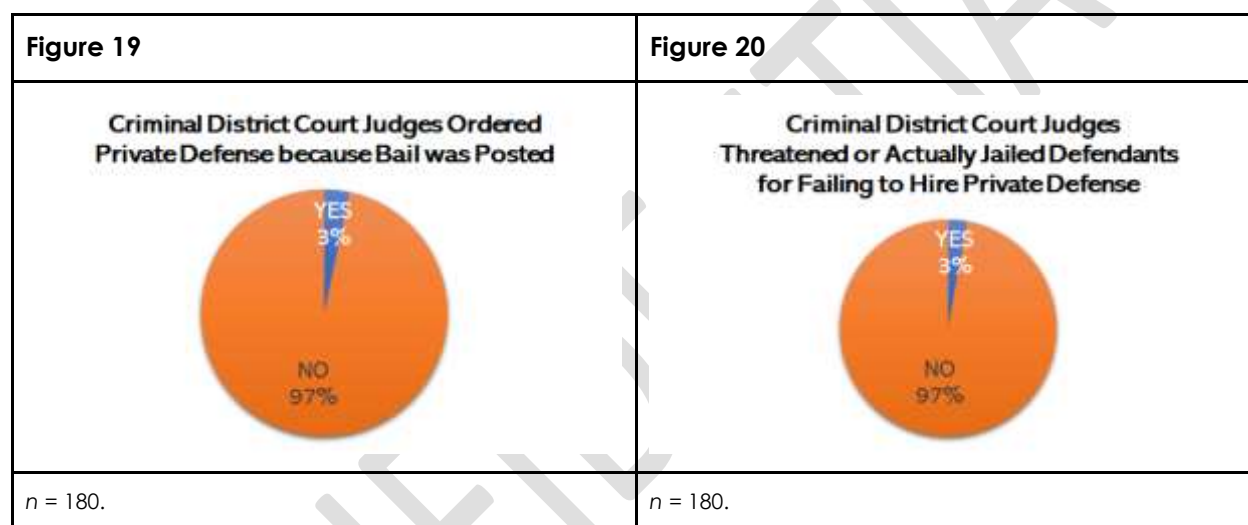


Figure 20 shows the percentage of times a criminal district court judge threatened to or actually jailed a criminal defendant for failing to hire a private defense attorney. The contempt power of trial courts goes unchecked most times a judge finds someone in contempt. Lawyers feel the need to concede the issue and it is rarely appealed.<sup>294</sup> This is the case despite the U.S. Supreme Court's warning of the potential for abuse in using imprisonment as a sanction for contempt, citing it as an 'arbitrary' power which is 'liable to abuse' and warning that care is needed to avoid arbitrary or oppressive conclusions."<sup>295</sup> As one law journal specifically stated,

The problem is that no one calls these judges out on their improper behavior—except, under exceptional circumstances, a disciplinary commission or appellate court or the press. Court staff—clerks, court officers, bailiffs, court reporters, probation officers—have little incentive to criticize judges and are loath to do so in

<sup>293</sup> Telephone Interview with Danny Engelberg, Orleans Pub. Defenders, Chief of Trials (April 19, 2019).

<sup>294</sup> Louis Raveson, A New Perspective on the Judicial Contempt Power, *Hastings Constitutional Law*, at 4, 18 *Hastings Bus L.J.* 1 (1990).

<sup>295</sup> *Bloom v. Illinois*, 391 U.S. 194, 202 (1968).

view of their place on the court totem pole. Other trial judges feel it is none of their business unless they have a supervisory role. Trial lawyers cannot call judges out on their bullying without risking reprisal. Many lawyers—especially public defenders—are repeat players.<sup>296</sup>

And yet we know that where the public has a positive perception of courtroom procedure as fair, neutral, and respectful, it results in reduced recidivism and increased compliance with court orders.<sup>297</sup> Procedural fairness, also known as procedural justice, is an evidence-based practice endorsed by the American Judges Association, National Center for State Courts, Conference of Chief Justices, and Conference of State Court Administrators.<sup>298</sup> As the latter two groups recently stated, “Extensive research demonstrates that, in addition to providing legal due process, it is important [for courts] to meet the public’s expectations regarding the process in order to increase positive public perceptions of the court system.”<sup>299</sup> Procedural fairness relates to the serious, real-world implications of whether the public perceives courtroom procedure to be fair, neutral, and respectful.<sup>300</sup> Thus, substantive law and objective case processing data mean little in this critical area. Instead, it is the lay public’s (admittedly subjective) perception that matters.<sup>301</sup> And while the police, lawyers, and court staff influence the public’s perception of procedural fairness, the judge is the primary contributor to whether people feel they are being treated fairly.<sup>302</sup> Judges, like other public servants, are not entitled to the public’s trust, but must instead earn it.

CWN found two 2018 cases in which a Criminal District Court Judge held a criminal defendant in contempt for failing to hire a private defense attorney. In Criminal District Court Section D, Judge Paul Bonin’s courtroom, a defendant was incarcerated by Judge Bonin for four days until they could pay the \$8,500 bail to be released. Judge Bonin originally remanded the defendant (so that there was no bail they could pay to be released) for nine days until changing the order to allow the defendant to pay bail and be released. The defendant had no attorney present to defend them from the contempt order or to show their failure to hire an attorney was not made “with an intent to defy the authority of the court.”

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<sup>296</sup> Abbe Smith, *Judges as Bullies*, 46 *Hofstra Law Review* 253, 272 (2017), available at [https://www.hofstralawreview.org/wp-content/uploads/2018/02/BB.10.Smith\\_.pdf](https://www.hofstralawreview.org/wp-content/uploads/2018/02/BB.10.Smith_.pdf).

<sup>297</sup> Resol. 12, Conf. of Chief JJs./Conf. of State Ct. Adm’rs, Access, Fairness and Pub. Trust Comm. (Jul. 31, 2013), <http://ccj.ncsc.org/~media/Microsites/Files/CCJ/Resolutions/07312013-Support-State-Supreme-Court-Leadership-Promote-Procedural-Fairness-CCJCOSCA.ashx>.

<sup>298</sup> See Susanne Beier, et al., *Influence of Judges’ Behavior on Perceived Procedural Justice*, 44 *J. of Applied Social Psychology* 57 (2013) (Noting that neutral observers may be better suited to making procedural fairness judgments than defendants themselves because they may have “a more objective perception of the [defendant’s] actual treatment.”). Utah and Alaska, two leaders in the procedural fairness movement, also use citizen observers to rate Judges as part of the two states’ official judicial performance evaluations. Hon. Steve Leben, *The Procedural-Fairness Movement Comes of Age*, Nat’l Ctr. for State Cts., Trends in State Cts. 60-61 (2014).

<sup>299</sup> Resol. 12, Conf. of Chief JJs./Conf. of State Ct. Adm’rs, Access, Fairness and Pub. Trust Comm. (Jul. 31, 2013), <http://ccj.ncsc.org/~media/Microsites/Files/CCJ/Resolutions/07312013-Support-State-Supreme-Court-Leadership-Promote-Procedural-Fairness-CCJCOSCA.ashx>.

<sup>300</sup> Kevin Burke & Steve Leben, *Procedural Fairness: A Key Ingredient in Public Satisfaction* (2007), available at [http://www.proceduralfairness.org/~media/Microsites/Files/procedural-fairness/Burke\\_Leben.ashx](http://www.proceduralfairness.org/~media/Microsites/Files/procedural-fairness/Burke_Leben.ashx); Resol. 12, Conf. of Chief JJs./Conf. of State Ct. Adm’rs, Access, Fairness and Pub. Trust Comm. (Jul. 31, 2013), <http://ccj.ncsc.org/~media/Microsites/Files/CCJ/Resolutions/07312013-Support-State-Supreme-Court-Leadership-Promote-Procedural-Fairness-CCJCOSCA.ashx>.

<sup>301</sup> Kevin Burke & Steve Leben, *Procedural Fairness: A Key Ingredient in Public Satisfaction* (2007), available at [http://www.proceduralfairness.org/~media/Microsites/Files/procedural-fairness/Burke\\_Leben.ashx](http://www.proceduralfairness.org/~media/Microsites/Files/procedural-fairness/Burke_Leben.ashx).

<sup>302</sup> *Id.*

COURT: Do you have a lawyer, Mr. [REDACTED]?

DEFENDANT: Yes. I'm going to go with the public defender's office.

COURT: That's not quite how it works. What kind of work do you do?

DEFENDANT: On the river, a superintendent.

COURT: You're going to need to fill out a financial declaration sheet. He's going to give you a paper to fill out about your finances. It's going to be under oath. Let me see his record Mr. Marullo, 540-824.

CLERK: Yes, sir.

(RECESS)

PROSECUTOR: Your Honor, Page 1 of this docket [REDACTED]. As a reminder, your Honor, we had originally had the arraignment set for April 30, 2018. The defendant showed up. I believe we had reset the arraignment until the 16th. The defendant was looking into something, and on the 16th we were out. So it is set today for arraignment.

COURT: Have you filled out the paperwork?

DEFENDANT: Yes.

COURT: It hasn't been filled out. You don't have any amounts in there.

DEFENDANT: Amount of what? How much I make?

COURT: Yes.

DEFENDANT: I don't know how much I make.

COURT: okay. That's fine. It's useless to me. Stand up. You look like you feel very inconvenienced.

DEFENDANT: No. I'm tired.

COURT: I'm sorry for that. I'm very sorry for that. All right, Mr. [REDACTED]. On April 30th I told that you were going to need to get your own lawyer.

DEFENDANT: Yes.

COURT: And you come here without a lawyer.

DEFENDANT: Yes.

COURT: All right. I'm going to remand you to the custody of the sheriff. I will set this matter for next Monday for hearing to determine counsel.

DEFENDANT: Until next Monday?

COURT: Yes.

DEFENDANT: Excuse me, Judge.

COURT: Yes?

DEFENDANT: I'm wondering why I'm in custody right now?

COURT: Because you're in contempt of court.

DEFENDANT: How am I in contempt of court?

COURT: Because I told you to come with a lawyer.

DEFENDANT: Look, I went to the public defender.

COURT: Do you want to talk? Come over here and talk. Do you want to act cute with me padnah [sic]?<sup>303</sup> Let me tell you something: when I gave you that financial form, you are supposed to tell how much you make. Do you

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<sup>303</sup> Padnah, pronounced paard-nah, is likely used as slang for partner.

want me to believe you don't know how much you make? You must be the only man in America who doesn't know how much he makes. You must be the only man in America who doesn't know how much he makes.

DEFENDANT: Because my check stub -- that's how much you talking about? Or are you talking about through the year?

COURT: What am I talking about?

DEFENDANT: or are you talking about through the year? I pay child support so I don't really know how much I make because my job is temporary, like a temp service.

COURT: That's it? So you couldn't put any figures down? You were unable to put any figures down?

DEFENDANT: See, I --

COURT: See, you're talking to me like I'm stupid.

DEFENDANT: No, I'm not talking stupid.

COURT: You really are. You really are.

DEFENDANT: You want to know how much I make during my temp, yeah. I can't tell you how much I make during the year because they seized me.

COURT: That's not what that question asked.

DEFENDANT: I made -- I didn't understand the question. Maybe I didn't do that. I ain't tripping about telling you how much I pay. That's nothing. You think I'm going to play with you behind that?

COURT: Yeah, I do.

DEFENDANT: Really?

COURT: Because you really look like you're quite put out about being here.

DEFENDANT: No. I'm tired. I just got off of work at nine o'clock. I have been at work 16 hours.

COURT: You should have asked them how much they are paying you.

DEFENDANT: Judge, no way I can get out of jail? I can't have no bond?

COURT: Do you want to fill out a form and act like this is a serious matter?

DEFENDANT: This is serious. How you figure it ain't serious to me?

COURT: Never mind. Never mind.

DEFENDANT: It's is serious to me. That's why I'm asking you. No, I wouldn't be talking to you if I didn't feel like it was serious.

COURT: sit down. Put him down not Monday because Monday is a holiday. May 30th.<sup>304</sup>

In Judge Darryl Derbigny's Section J, a defendant was sentenced to 25 hours of community service for contempt when they failed to hire a private defense attorney. This defendant had previously been appointed a public defender on an earlier, and still open, pending case (when they were held in contempt).

PROSECUTOR: Judge, if we could turn to page 8 of the docket for Case No.

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<sup>304</sup> Transcript transcribed by Stenographer Eve Kazik, Criminal District Court Section D, Case No. 540824, (May 21, 2018).

[REDACTED] and [REDACTED], [REDACTED]. It's set for a hearing to determine counsel, Judge.

COURT: Yes, sir. Who's your lawyer, sir?

DEFENDANT: I didn't get one.

COURT: Did I tell you go hire somebody?

DEFENDANT: Yeah, I tried to. I called lawyers around and --

COURT: How many people did you see, Mr. [REDACTED]?

DEFENDANT: I saw five people.

THE COURT: Do you have a list for me?

DEFENDANT: No.

COURT: Okay. Sit down and write the names of the people that you saw for me. I want to know that.

DEFENDANT: Okay.

COURT: Let's call another matter while that happens.  
(OTHER COURT MATTERS WERE HANDLED.)

PROSECUTOR: Judge, if we can turn to [REDACTED], page 8.

COURT: [REDACTED], step up. (DEFENDANT COMPLIES.)

COURT: First things first, Mr. [REDACTED]. I'm not satisfied that you were forthcoming with the Court when you told me about your attempts to contact lawyers. I'm going to hold you in contempt, Mr. [REDACTED]. I'm going to order you to perform 25 hours of community service in this building. Do you understand that, sir?

DEFENDANT: Okay.

COURT: All right. And you are going to get that information to go down and do that service before you leave here today, okay?

DEFENDANT: The whole 25 hours, like --

COURT: You are going to discuss that with my staff. Okay? I will formally appoint Public Defender's Office to represent Mr. [REDACTED] in all pending cases.<sup>305</sup>

These two cases represent the minimum number of 2018 cases where a criminal defendant was held in contempt for failing to hire a private attorney.

**Recommendation 8: Courts should hold a defendant in contempt for failure to hire a private defense attorney only if there is proof beyond a reasonable doubt that the defendant willfully disobeyed the court's order to hire a private defense attorney. Additionally, courts should carefully determine a defendant's ability to pay for a private attorney before ordering them to do so. In addition to providing legal due process, it is important for judges to meet the public's expectations that courtroom procedure be fair, neutral, and respectful.**

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<sup>305</sup> Transcript transcribed by Stenographer Natasha Kahler, Criminal District Court Section J, Case No. 541835, (May 21, 2018).

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## 2. CONTEMPT FOR A POSITIVE DRUG SCREEN TEST

The Orleans Criminal District Court Drug Testing Lab Policy and Procedure Manual ("Manual") sets forth the Court's goals of drug testing as, "[A] deterrent to future drug use; Identify donors who need treatment; Identify donors who are maintaining abstinence; Identify donors who have relapsed; Provide incentive, support and accountability for donors; Adjunct to treatment and frames [sic.] sanction decisions."<sup>306</sup>

*I think we try to make them a better person. When they come out of the system, we would like to think that they were better than when they went in the system. . . Substance abuse counseling is another big problem. . . When they come into the system, it's sort of incumbent upon us to try to get them to solve that problem.*

*-Leon Cannizzaro, Orleans Parish District Attorney (at a recent discussion on "The State of the City" hosted by The Atlantic)*

These therapeutic goals are being undermined in several ways. First, the Manual does not represent scientific best practices, in which the presumptively positive drug test is confirmed using a definitive alternative testing method such as LC-MS/MS.<sup>307</sup> Second, the Orleans Criminal District Court Drug Testing Lab ("Drug Testing Lab" or "Lab") does not appear to follow its own Policy and Procedure Manual in several respects. Third, drug testing of defendants in Orleans Criminal District Court appears to be a common occurrence, and heavily weighted toward punitive sanctions (increased or forfeited bond, incarceration, fines, or community service) as opposed to treatment options, circumstances unlikely to decrease recidivism.

In order to rely on drug testing to decide whether to sanction defendants, the Court must have a reasonable understanding of scientific evidence-based standards, as well as an understanding of the limitations of the available drug testing equipment. According to *The Drug Court Judicial Benchbook*, "When drug testing is performed on site, within the purview of the court, it becomes the responsibility of the court, and ultimately the judge, to guarantee that the testing is accomplished in a forensically acceptable manner."<sup>308</sup> All too often court personnel draw unwarranted or unsupportable conclusions from drug-testing results that would not withstand scientific challenge or legal scrutiny."<sup>309</sup>

Drug testing, according to both the scientific community and the National Drug Court Institute, should be done in two steps to produce the most reliable and accurate results: (1) screening and

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<sup>306</sup> Orleans Criminal District Court Drug Testing Lab Policy and Procedure Manual at 4.

<sup>307</sup> See Jarvis, et al. at 9.

<sup>308</sup> Drug Court Judicial Benchbook at 125.

<sup>309</sup> *Id.* at 126 (also noting that the "judiciary should recognize that there is often a gap between the questions that legal professionals would like to have answered by drug testing and the answers that the scientific community can legitimately provide").



(2) confirmation.<sup>310</sup> Screening, analogous to “casting a wide net,” occurs with a qualitative test called immunoassay.<sup>311</sup> An immunoassay “reacts to the presence of a class of drugs” by indicating whether the drug test sample reaches a cutoff level, or a certain amount of the target substance.<sup>312</sup> When a drug screen reaches the cutoff level, the results are considered presumptively positive until confirmed by a definitive test.<sup>313</sup> The results are then confirmed by running the same drug test sample through an alternative testing method.<sup>314</sup> Confirmation, analogous to casting a “smaller, more refined net,” should occur by gas or liquid chromatography combined with mass spectrometry (“LC-MS/MS”), which together are considered the “gold standard methods of drug testing.”<sup>315</sup> Chromatography is applied to separate a drug test sample into its component parts, while mass spectrometry identifies those parts.<sup>316</sup> Put another way, samples that are positive by the screening assay are double-checked using a second, different test to ensure that the first test was indeed accurate. Confirmation of a presumptive positive test is one of the surest techniques to eliminate false positive results.<sup>317</sup> If a re-test of the same sample using the same testing method arrives at a different conclusion from the initial screen, that merely indicates an inconsistency within the screening machinery and not a separate drug test result.<sup>318</sup> A confirmation policy adds a greater level of fairness and certainty to the drug-testing process, while at the same time minimizing potential legal issues concerning the validity of test results.”<sup>319</sup>

The Drug Testing Lab is located on the first floor of Orleans Criminal District Court. The drug testing analyzer within the Lab is capable of screening drugs through urinalysis immunoassay.<sup>320</sup> Although the Manual states, “Drug testing procedures follow all state and federal guidelines, including those applicable to ‘screening’ and ‘confirmation,’”<sup>321</sup> the Lab lacks any equipment capable of performing definitive drug tests such as LC-MS/MS,<sup>322</sup> and there is no indication that drug testing samples are sent off-site to confirm presumptively positive test results. Rather, the Manual explains the following procedure,

Donors are initially screened for a 9-panel (Full Panel) test to include detection of cocaine, marijuana, opiates, creatinine and alcohol, methadone, ecstasy, benzodiazepines and amphetamines. The screen also includes the client's drug of

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<sup>310</sup> See Margaret Jarvis et al., Consensus Statement: Appropriate Use of Drug Testing in Clinical Addiction Med., 11 J. of Addiction Med. 163-73 (2017); See also National Drug Ct. Inst., The Drug Court Judicial Benchbook, 123-24 (Douglas B. Marlowe & William G. Meyer eds., 2011).

<sup>311</sup> Margaret Jarvis et al., Consensus Statement: Appropriate Use of Drug Testing in Clinical Addiction Medicine, 9 (Am. Soc. of Addiction Med. 2017).

<sup>312</sup> *Id.* at 8.

<sup>313</sup> *Id.* at 10.

<sup>314</sup> *Id.* at 9.

<sup>315</sup> *Id.*

<sup>316</sup> *Id.*

<sup>317</sup> *Id.*

<sup>318</sup> Interview with Dr. Arwen Podesta & Dr. George Singletary, in New Orleans, La. (Feb. 4, 2019).

<sup>319</sup> Nat'l Drug Ct. Inst. at 124; See also Alere Toxicology, Drug Detection and Monitoring Chart: Common Drug of Abuse, 2013 (examination of LC-MS/MS results following immunoassay testing found rates of false positive results including 61% benzodiazepines, 46% methadone, 21% marijuana, 21% amphetamines, and 12% cocaine identified as positive on immunoassay but negative on LC-MS/MS).

<sup>320</sup> Agreement for Services Between DCI and New Orleans Criminal Ct. (June 8-9, 2019) (on file with CWN).

<sup>321</sup> Orleans Criminal District Court Drug Testing Lab Policy and Procedure Manual P. 4 (rev. 2013-12).

<sup>322</sup> Response to Public Records Request from Robert Kazik, Orleans Crim. Dist. Ct. Jud. Adm'r, to Veronica Bard, CWN Deputy Dir. (Feb. 21, 2019) (on file with CWN).



choice as well as any other drug or drugs as ordered by the judge and/or case manager.

Thereafter, donors are screened for a minimum 7-panel (Basic Panel) result to include detection of cocaine, marijuana, opiates, creatinine and alcohol, methadone, and amphetamines. The screen should also include the client's drug of choice as well as any other drug or drugs as ordered by the judge and/or case manager.

All positive tests, regardless of the drug or drugs, will be automatically retested [sic.] by the drug screening lab for confirmation. This retest [sic.] will be conducted from the same urine sample as the original test.<sup>323</sup>

CWN volunteers reviewed case files of defendants who were held in contempt of court for having a positive drug test result in 2018. Drug test results were not always found in case files, and CWN volunteers were able to review results in eleven cases. In each case, there was no confirmation of positive drug screen results using an alternative testing method on the same sample. In nine cases, there was no re-test of positive drug screens in the case file. In two cases, defendants produced a sample which had a positive result and then produced another sample the following day or two days later which also yielded a positive result. This is contrary to scientific best practices, which require confirmation using a different testing method on the same sample. Criminal District Court Judicial Administrator Robert Kazik stated that the Drug Testing Lab automatically retests positive drug screen results and produces only one report per case file.<sup>324</sup> CWN also found that the number of drugs screened did not vary within cases, as set forth in the Manual. For instance, if a defendant was tested multiple times, they were always screened based on the 7-drug Basic Panel. According to *The Drug Court Judicial Benchbook*, "In order for case adjudication to be appropriate, consistent, and equitable, drug detection procedures must produce results that are scientifically valid and forensically defensible."<sup>325</sup> There are real concerns that in Criminal District Court this is not the case. For the above reasons, CWN finds that sanctions based on positive drug screens in Orleans Criminal District Court are inappropriate, inconsistent, and inequitable.

Drug testing of defendants in Orleans Parish District Court appears to be a common occurrence, with increased or forfeited bond, incarceration, fines, or community service frequently imposed as sanctions for a positive test. There are several points in a case when a defendant may be ordered to take a drug test. Depending on a defendant's criminal charges, the Magistrate Judge or Commissioner may be statutorily required to order at least one drug test, which is typically ordered at the defendant's first appearance in Magistrate Court.<sup>326</sup> CWN volunteers observed the Magistrate Judge or Commissioner condition a defendant's bail release upon drug tests in 6% of defendants' first appearances in court.<sup>327</sup> Once released on bond and allotted (assigned) to a

<sup>323</sup> Orleans Criminal District Court Drug Testing Lab Policy and Procedure Manual P. 4 (rev. 2013-12).

<sup>324</sup> Telephone Interview with Robert Kazik, Jud. Adm'r, Orleans Parish Crim. Dist. Ct. (May 13, 2019).

<sup>325</sup> Drug Court Judicial Benchbook at 115.

<sup>326</sup> La. Stat. Ann. § 320, "Every person arrested for a violation of the Uniform Controlled Dangerous Substances Law or a crime of violence as provided in R.S. 14:2(B) shall be required to submit to a pre-trial drug test for the presence of designated substances in accordance with the provisions of this Article and rules of court governing such testing."

<sup>327</sup> N = 1,485 first appearances in 2018 in Orleans Parish Magistrate Court.

Criminal District Court section, the Criminal District Court judge may require the defendant to undergo drug testing where the Magistrate or Commissioner did not. Sanctions for a positive drug screen vary from judge to judge and case to case.

CWN located cases where defendants were held in contempt of court in 2018 for positive drug results in the following judges' sections: Judge Laurie White, Judge Benedict Willard, Judge Paul Bonin, Judge Robin Pittman, and Judge Franz Zibilich. This does not mean that contempt for drug cases did not occur in other judges' courtrooms; CWN's observations represent the minimum number of 2018 contempt cases. Of these contempt cases found by CWN, defendants incarcerated for positive drug screens were jailed an average of 18 days.<sup>328</sup> The cases listed in Table 3 do not identify whether the defendants had received multiple positive drug screen results before they were held in contempt, as this information was often not found in court case files examined by CWN. This report also does not address the number of cases in which judges referred defendants to social services as opposed to incarceration, and the defendants ultimately became successful in leading an addiction-free lifestyle without reentering the criminal justice system. Criminal District Court operates Court Intervention Services (CIS), which includes various programs, such as Drug Court. In lieu of incarceration, judges can place a defendant with a substance abuse problem on probation, with a requirement of Drug Court. The judge may also require outpatient or inpatient drug treatment, as the goal is to help those addicted to substances live a sober, productive life. Table 3 lists Criminal District Court judges who held defendants in contempt, the number of defendants held in contempt, and defendants' sanctions for positive drug screens in 2018.

Table 3: Defendants Sanctioned for Positive Drug Screens in 2018		
Judge	Defendants Held in Contempt for Positive Drug Screens	Sanction for Positive Drug Screens
White	3	Each was fined \$500.
Willard	56	<ul style="list-style-type: none"> <li>• 49 were incarcerated an average of 20 days.</li> <li>• 2 were fined \$250 and \$400, respectively.</li> <li>• 5 case files did not list a punishment.</li> </ul>
Bonin	9	<ul style="list-style-type: none"> <li>• 3 were incarcerated an average of 2 days.</li> <li>• 1 received 50 hours of community service.</li> <li>• 5 case files did not list a punishment.</li> </ul>
Pittman	4	<ul style="list-style-type: none"> <li>• 2 were incarcerated an average of 11 days.</li> <li>• 2 were fined \$100 in lieu of 24 hours in jail.</li> </ul>
Zibilich	5	Defendants were incarcerated an average of 10 days.

<sup>328</sup> N = 59.

In 2016, the City of New Orleans shifted away from the policy of incarcerating individuals solely for marijuana possession.<sup>329</sup> Notably, DA Cannizzaro said at “The State of the City” discussion hosted by *The Atlantic*, “People who test positive for marijuana . . . understand the issue. I understand that issue, and I think that many of the judges do not put people in jail simply because they test dirty for marijuana.”<sup>330</sup> Nevertheless, out of the eleven public case files containing drug test results, CWN volunteers found two cases in which defendants who had tested positive only for cannabinoid (marijuana) were held in contempt and incarcerated. Again, these contempt cases for marijuana represent the minimum number of cases in 2018.



### Marijuana Cases

The 1<sup>st</sup> defendant was screened for 10 drugs, tested positive for marijuana, and incarcerated by Judge Willard for **34 days**.

The 2<sup>nd</sup> defendant was screened for 7 drugs, tested positive for marijuana, and incarcerated by Judge Bonin for **3 days**.



Some believe that requiring individuals in the criminal justice system to abide by specific conditions for their release, whether pre-trial or post-conviction, enhances the individual's opportunities to succeed in life without reverting to crime. For example, at the “State of the City” discussion, DA Cannizzaro said,

You're not gonna throw the first[-time] offender in jail, and you're gonna put conditions on that probation that the judge realizes or recognizes would prevent that person from coming back into the system again, like education, substance abuse counseling, job training, mental health treatment. . . <sup>331</sup> The problem that we see on- in- in many of the circumstances in where they end up in Sheriff Gusman's jail is because they don't comply with those conditions of probation; they- they sometimes just, they thumb their nose at 'em, they- they simply defy them.<sup>332</sup>

During the discussion, OPD Chief District Defender Derwyn Bunton stated,

If the problem is substance abuse, and the symptom is crime, I don't go to jail to get drug treatment; I go to a hospital. . . Let that man be a husband and father. Let that man go to work every day and every time he gives you a dirty test say man, it's another dirty test. Are you late on any of your bills? No. Are you a father to your children? Yes. Are you a husband to your wife? Yes. Well, I guess we've just got to chalk this one up to another dirty test.<sup>333</sup>

<sup>329</sup> City of New Orleans Ordinance 31,148 (Mar. 23, 2016).

<sup>330</sup> Leon Cannizzaro, Remarks at The Atlantic.

<sup>331</sup> *Id.*

<sup>332</sup> *Id.*

<sup>333</sup> Derwyn Bunton, Remarks at The Atlantic.

Chief Justice of Criminal District Court, Keva Landrum-Johnson then weighed in with the following statement:

I don't give people a bunch of conditions that I think people will fail. So, honestly, if you're a first offender, I am not going to give any conditions. I don't- I don't mandate drug tests. I don't mandate GEDs. I don't mandate those things, because I don't want people to not be successful. I want people to ultimately be successful. And so, the fact is, I am not going to put up a bunch of barriers that people will not be able to cross.<sup>334</sup>

Judge Tracey Flemings Davallier serves as both a Drug Court judge and as the Judicial Liaison for Court Intervention Services (CIS) which includes Drug Court. She states,

"In lieu of incarceration, judges will place a defendant with a substance abuse problem on probation, with a requirement of Drug Court or may require outpatient or inpatient drug treatment, as the goal is to help those addicted to substances address the underlying causes of such abuse with intensive case management and a myriad of counseling services. This approach affords offenders the opportunity to live a sober, healthy and productive life; and to decrease the chances of recidivism. Drug Testing is a vital part of any drug treatment and case management as it allows for a meaningful and effective course of action."<sup>335</sup>

In fact, numerous post-conviction studies indicate that requiring probationers or parolees to comply with a regular condition such as drug testing is ineffective in reducing recidivism.<sup>336</sup> The Brookings Institute reviewed five studies<sup>337</sup> published between 2010 and 2017 and arrived at the following conclusion:

These studies show that current efforts to reduce recidivism through intensive supervision are not working. Why is intensive supervision so ineffective? Requiring lots of meetings, drug tests, and so on can complicate a client's life, making it more difficult to get to work or school or care for family members (meetings are often scheduled at inconvenient times and may be far away). A heavy tether to the criminal justice system can also make it difficult for individuals to move on, psychologically. Knowing that society still considers you a criminal may make it harder to move past that phase of your life. These difficulties may negate the

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<sup>334</sup> Keva Landrum-Johnson, Remarks at The Atlantic.

<sup>335</sup> Email from Judge Tracey Flemings-Davallier, to Simone Levine, Dir., Ct. Watch NOLA (May 13, 2019, 11:38 CST) (on file with author).

<sup>336</sup> Doleac, Jennifer L. "Study after Study Shows Ex-Prisoners Would be Better off without Intense Supervision," Brookings Inst. (07/02/2018) <https://www.brookings.edu/blog/up-front/2018/07/02/study-after-study-shows-ex-prisoners-would-be-better-off-without-intense-supervision/> (accessed 04/17/2019).

<sup>337</sup> "Five Year Outcomes in a Randomized Trial of a Community-Based Multi-Agency Intensive Supervision Juvenile Probation Program;" "The effects of low-intensity supervision for lower-risk probationers: updated results from a randomized controlled trial;" "An Evaluation of Day Reporting Centers for Parolees: Outcomes of a Randomized Trial;" "Does increased post-release supervision of criminal offenders reduce recidivism? Evidence from a statewide quasi-experiment;" and "An Experimental Evaluation of the Impact of Intensive Supervision on the Recidivism of High-Risk Probationers."

valuable support that probation and parole officers can provide by connecting clients to services and stepping in to help at the first sign of trouble.<sup>338</sup>

In other words, probationers and parolees may not be made “better than when they went in the system”<sup>339</sup> by regular drug testing. On the contrary, excessive drug testing and a focus on punitive sanctions as opposed to treatment options can only contribute to recidivism, whether pre-trial or post-conviction.

**RECOMMENDATION 9: Judges should not sanction defendants without proper testing that follows scientific best practices. The Drug Testing Lab should research available definitive confirmation testing options. Once the Lab has a scientifically accepted procedure in place, the Lab should execute its procedures consistently in every case. Judges should carefully consider their objectives for ordering each drug test and question whether a drug test required of a specific defendant at that specific moment will help achieve those judicial objectives.**

## B. GUILTY PLEAS FOR INCARCERATION AND HABITUAL OFFENDER STATUS

Louisiana's habitual-offender law requires judges to increase mandatory minimum sentences for criminal defendants who have previously been convicted of felony offenses when requested by the prosecutor.<sup>340</sup> A criminal defendant who has been convicted of one or several previous felony offenses faces longer prison sentences if the District Attorney decides to apply the habitual offender law when the defendant takes a plea or when the defendant is sentenced.<sup>341</sup> It is within the discretion of the District Attorney's Office whether to charge the defendant as a habitual offender.<sup>342</sup> The Orleans Parish District Attorney's Office's previous use of the habitual offender law was controversial, as highlighted in national<sup>343</sup> and local<sup>344</sup> media sources. It was widely reported that the Orleans Parish District Attorney had previously used the habitual offender law in sentencing more often than any other Louisiana Parish. Between January 2009 (when Cannizzaro was first in office) and 2017,<sup>345</sup> Orleans Parish prosecutors charged people under the habitual offender statute more than 2,600 times, compared to East Baton Rouge, which used the law 66 times during the same period.<sup>346</sup> Cannizzaro's use of the habitual offender laws made national

<sup>338</sup> Doleac, Jennifer L. “Study after Study Shows Ex-Prisoners Would be Better off without Intense Supervision,” Brookings Inst. (07/02/2018) <https://www.brookings.edu/blog/up-front/2018/07/02/study-after-study-shows-ex-prisoners-would-be-better-off-without-intense-supervision/> (accessed 04/17/2019).

<sup>339</sup> Leon Cannizzaro, Remarks at The Atlantic.

<sup>340</sup> La. Stat. Ann. § 15:529.1.

<sup>341</sup> La. Stat. Ann. § 15:529.1(D)(1)(b).

<sup>342</sup> *Id.*

<sup>343</sup> Reveal: 10 Years or Life, Ctr. for Investigative Reporting (Oct. 6, 2018), available at <https://www.revealnews.org/episodes/10-years-or-life>; Andru Okun, Harry Moses of Guilty Until Proven Guilty, ANTI-GRAVITY (Oct. 2018), <http://www.antigravitymagazine.com/2018/10/director-qa-harry-moses-of-guilty-until-proven-guilty/>.

<sup>344</sup> Eve Abrams, Habitual Offender Prosecutions down in New Orleans, The Lens, Nov. 29, 2018, available at <https://thelensnola.org/2018/11/29/habitual-offender-prosecutions-down-in-new-orleans/>; Matt Sledge & John Simerman, New Orleans DA, Criminal Court and Cops Make Budget Pitches to Council, New Orleans Advocate, Nov. 13, 2018, available at [https://www.theadvocate.com/new\\_orleans/news/courts/article\\_ed110fa0-e78e-11e8-839d-af0f2a46754f.html](https://www.theadvocate.com/new_orleans/news/courts/article_ed110fa0-e78e-11e8-839d-af0f2a46754f.html).

<sup>345</sup> Reveal: 10 Years or Life, *supra* note 347.

<sup>346</sup> *Id.*

headlines again when his office charged a criminal defendant as a habitual offender for stealing \$31 worth of candy, exposing them to a sentence of 20 years to life.<sup>347</sup>

With recent changes made to state law relating to the sentencing of habitual offenders, the Orleans Parish District Attorney's Office has used the habitual offender law in sentencing less than it had before.<sup>348</sup> In an analysis conducted by the Lens based on Department of Corrections data, Orleans prosecutors used the statute as a sentencing enhancement in 63 felony convictions between November 1, 2017 and October 28, 2018.<sup>349</sup> This use of the statute in sentencing compares to 73 times used in Jefferson Parish and 76 times used on the North Shore.<sup>350</sup> But Orleans Parish still used the habitual offender law more than similarly sized East Baton Rouge Parish, where the habitual offender law was used only once during the same period.<sup>351</sup> At a City Council hearing in 2018, Cannizzaro said the DA's office has used the statute in sentencing in about 6% of cases, compared to 13% the previous year and 21% the year before that.<sup>352</sup>

However, as the Lens stated in its analysis, the decrease in the number of convictions under the habitual offender statute "only tell(s) a fraction of the story in how prosecutors have used the habitual-offender law."<sup>353</sup> With the vast majority of Orleans Parish cases ending in pleas, the larger question is how often prosecutors use the threat of sentencing a defendant as a habitual offender in their negotiations to obtain a plea.<sup>354</sup>

The Figure below indicates a slight decrease in the rate of defendants who pleaded guilty after someone had referred to them as a "habitual offender," "multiple bill," "double," "triple," "quad," or "lifer," from 16% in 2017 to 13% in 2018. Additionally, CWN found a slight decrease in the rate of guilty pleas by defendants while they were incarcerated from 51% in 2017 to 48% in 2018.

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<sup>347</sup> Sarah Larimer, This Man is Accused of Candy Theft, THE WASHINGTON POST (Apr. 6, 2016), [https://www.washingtonpost.com/news/true-crime/wp/2016/04/06/this-man-is-accused-of-stealing-31-worth-of-candy-under-louisiana-law-he-could-spend-life-in-prison/?utm\\_term=.f976f8a5f3e5](https://www.washingtonpost.com/news/true-crime/wp/2016/04/06/this-man-is-accused-of-stealing-31-worth-of-candy-under-louisiana-law-he-could-spend-life-in-prison/?utm_term=.f976f8a5f3e5).

<sup>348</sup> Eve Abrams, Habitual Offender Prosecutions down in New Orleans, The Lens, Nov. 29, 2018, available at <https://thelensnola.org/2018/11/29/habitual-offender-prosecutions-down-in-new-orleans/>; Matt Sledge & John Simerman, New Orleans DA, Criminal Court and Cops Make Budget Pitches to Council, New Orleans Advocate, Nov. 13, 2018, available at [https://www.theadvocate.com/new\\_orleans/news/courts/article\\_ed110fa0-e78e-11e8-839d-af0f2a46754f.html](https://www.theadvocate.com/new_orleans/news/courts/article_ed110fa0-e78e-11e8-839d-af0f2a46754f.html).

<sup>349</sup> *Id.*

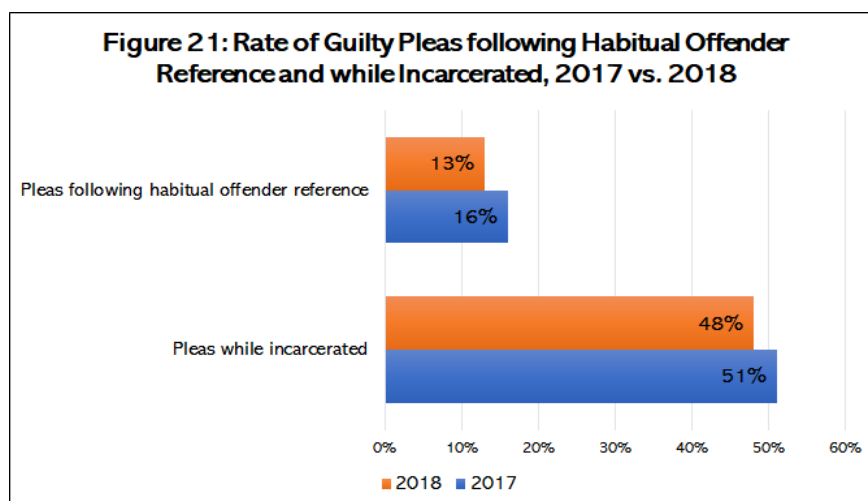
<sup>350</sup> *Id.*

<sup>351</sup> *Id.*

<sup>352</sup> Matt Sledge, New Orleans DA, Criminal Court and Cops Make Budget Pitches to Council, THE LENS (Nov. 13, 2018), <https://thelensnola.org/2018/11/29/habitual-offender-prosecutions-down-in-new-orleans/>.

<sup>353</sup> *Id.* at 334.

<sup>354</sup> *Id.* at 338.



*n* = 456 (2017), 487 (2018).

### C. MARIJUANA CASES

In March 2016, the City of New Orleans passed a municipal ordinance that allowed the New Orleans Police Department to issue a summons (and thereby not arrest and incarcerate the individual) in certain marijuana cases and to require a fine instead of jail time.<sup>355</sup> When the individual receives a summons, that person is required to go to Municipal Court to appear on the misdemeanor offense of marijuana possession.<sup>356</sup> While many websites, particularly tourist or marijuana enthusiast websites, touted the change in law as “decriminalization,”<sup>357</sup> marijuana very much remains illegal in New Orleans, and it is essential that the public be educated as to the current status of the law.

In New Orleans, an individual may still be arrested (as opposed to receiving a summons) on a marijuana offense if:

- The individual stopped is under the age of 17 years old;<sup>358</sup>
- The NOPD officer suspects the individual intends to distribute the marijuana; this determination is made by the officer and must be approved by the officer's supervisor;<sup>359</sup>

<sup>355</sup> Kevin Litten, NOPD Marijuana Arrests Plunged to 1 Percent After Ordinance Change, Nola.com, Mar. 28, 2018, available at [https://www.nola.com/politics/2018/03/marijuana\\_ordinance\\_new\\_orlean.html](https://www.nola.com/politics/2018/03/marijuana_ordinance_new_orlean.html).

<sup>356</sup> New Orleans Criminal Code Sec. 54-505 Sec (g); NOPD Operations Manual, Affidavit and Summons, Chapter 41.8.

<sup>357</sup> Marijuana Policy Project, La. Med. Marijuana Program Still not Functioning, <https://www.mpp.org/states/louisiana/> (last visited Mar. 1, 2019). See also Kush Tourism, Is Weed Legal in La.? La. Marijuana Laws, <https://kushtourism.com/louisiana-marijuana-information/> (last visited May 1, 2019).

<sup>358</sup> Greg LaRose, New Orleans Softens Marijuana Laws Starting This Week, Nola.com (Jun. 20, 2016), [https://www.nola.com/crime/2016/06/new\\_orleans softer\\_marijuana\\_p.html](https://www.nola.com/crime/2016/06/new_orleans softer_marijuana_p.html).

<sup>359</sup> Michael Harrison, NOPD Interoffice Correspondence Memo to All Department Personnel, General Order #1030 (Jun. 1, 2016), “If the investigating officer believes sufficient facts or circumstances exist to indicate or substantiate that the offense is other than simple possession (e.g. quantity of CDS in individualized packaging, unusual quantity of small denomination currency, apparatus to weigh or measure, etc.) the officer shall contact his or her supervisor and explain the relevant facts or circumstances. In the event the supervisor approves the officer shall charge appropriately in State Court with State charges. The supervisor’s approval shall be documented in the NOPD Incident Report.”



- If the individual is found to be in possession of a synthetic cannabinoid and they have any prior convictions for simple possession of a synthetic cannabinoid;<sup>360</sup>
- If the marijuana possession occurred in: a school, a property used for school purposes, 2000 feet of a school, a school bus, property used for drug treatment, 2000 feet of property used for drug treatment if a drug free zone sign is posted, a religious building property or within 2000 ft. of it if a drug free zone sign is posted, public housing authority property or within 2000 ft. of it if a drug free zone sign is posted, child day care center property or within 2000 ft. of it if a drug free zone sign is posted;<sup>361</sup>
- If the individual does not possess identification;<sup>362</sup>
- If the individual makes a statement that indicates an intent to disregard the summons or refuses to sign the summons;<sup>363</sup>
- If the individual acts in a violent or destructive manner or makes a statement indicating that they intend to inflict injury to self or another or damage to property;<sup>364</sup>
- If the individual has a criminal history of two or more felony convictions or five or more felony or municipal arrests for any offense;<sup>365</sup>
- Based on the circumstances, an officer determines that it is absolutely necessary to make an arrest;<sup>366</sup>
- If the individual is not in actual, constructive or shared possession of the marijuana;<sup>367</sup>
- If the marijuana is 2.5 pounds or more;<sup>368</sup>
- The NOPD officer has reasonable grounds to believe the person will continue to possess marijuana unless immediately arrested and booked;<sup>369</sup>
- If the individual has a warrant for: any felony case, operation of a vehicle while intoxicated, the illegal use or possession of a weapon, the use of force or violence, except the crime of simple battery, the failure to pay a legal child support obligation, and all domestic violence related crimes;<sup>370</sup>
- If the individual has a Municipal Court INSTANTA subpoena or multiple traffic or municipal warrants/attachments for failure to appear.<sup>371</sup>

Despite the many above-mentioned exceptions, NOPD has an affirmative policy encouraging “the use of summons in lieu of custodial arrest when appropriate and when the safety of the public is not threatened.”<sup>372</sup> Court records indicate that in 2018, NOPD issued a summons in 85% of the

<sup>360</sup> *Id.*

<sup>361</sup> *Id.*

<sup>362</sup> New Orleans Mun. Code § 54-28.

<sup>363</sup> *Id.*

<sup>364</sup> *Id.*

<sup>365</sup> *Id.*

<sup>366</sup> *Id.*

<sup>367</sup> *Id.* at 345.

<sup>368</sup> *Id.*

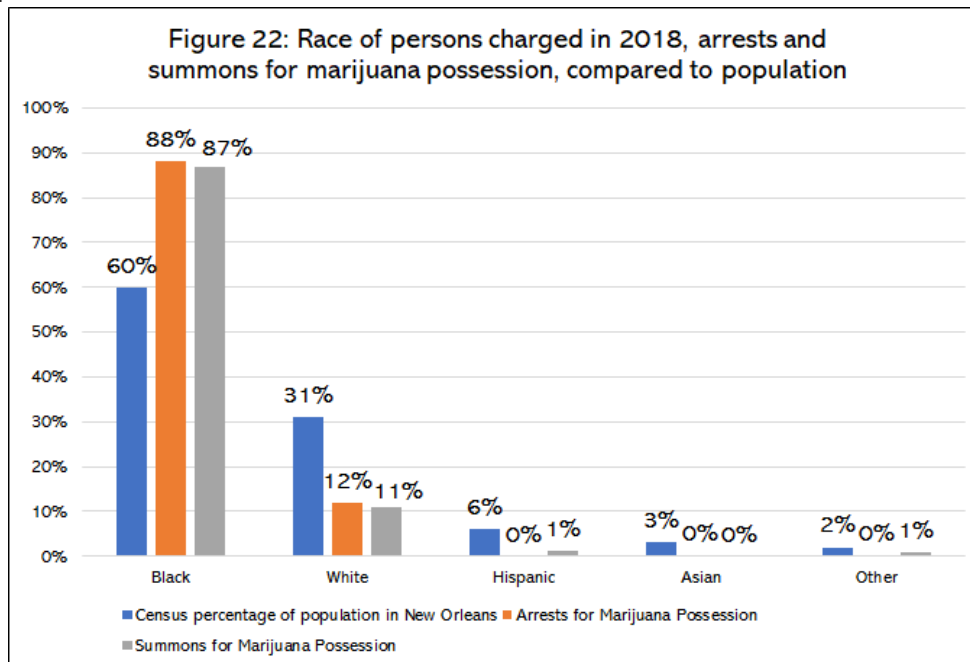
<sup>369</sup> New Orleans Police Dept. Operations Manual Chapter: 41.8 Title: Affidavit & Summons (Non-traffic) Effective: 10/29/2017 Revised: 03/01/2018.

<sup>370</sup> *Id.*

<sup>371</sup> New Orleans Police Dept. Operations Manual Chapter: Chapter: 74.3.1 Failure to Appear - Summons In Lieu Of Physical Arrest Effective: 01/14/2018.

<sup>372</sup> *Id.* at 356. There has been a significant decrease in the number of marijuana arrests since the law has been put into place. City Council examined data from 2011 to 2014 and found there were 5,000 fewer arrests and summonses, a 31% decrease compared to the number of arrests and summonses from 2007 to 2010. The summons rate for African

2,871 total incidents involving marijuana possession.<sup>373</sup> Figure 22 below illustrates the racial distribution of persons charged with possession of marijuana, according to data provided to CWN by Municipal Court.

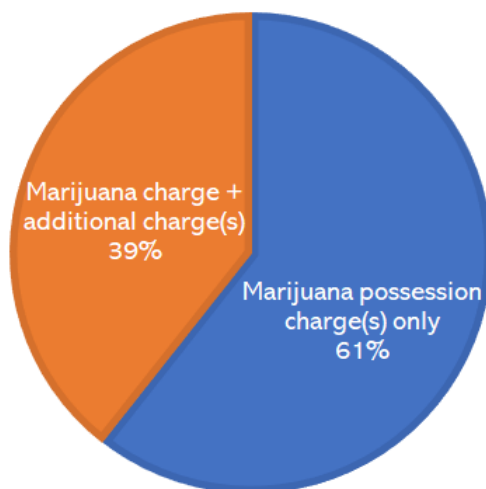


Source: Municipal and Traffic Court of New Orleans Clerk of Court. N = 393,292 (census population estimate of Orleans Parish as of July 1, 2017), 2,437 (persons issued summons for marijuana possession), 434 (persons arrested for marijuana possession).

In Figure 23 below, 39% (or 171) arrestees were charged with possession of marijuana plus additional charges other than marijuana possession. Sixty-one percent (61% or 263) arrests were charged with only marijuana possession. Of the 61% or 263 arrests for only marijuana possession, 214 of those arrests were charged under the municipal ordinance for Simple Possession of Marijuana, and 49 of those arrests were charged under the state statute for possession of marijuana, also known as Schedule I drugs.

Americans (69%) was roughly the same as for whites (68%) during the examined 2011 to 2014 time period. Greg LaRose, New Orleans Softens Marijuana Laws Starting This Week, Nola.com (Jun. 20, 2016), [https://www.nola.com/crime/2016/06/new\\_orleans softer\\_marijuana\\_p.html](https://www.nola.com/crime/2016/06/new_orleans softer_marijuana_p.html). 75% of those arrested in this 2011 to 2014 time period were African American. Kevin Litten, NOPD Marijuana Arrests Plunged to 1 Percent After Ordinance Change, Nola.com, Mar. 28, 2018, available at [https://www.nola.com/politics/2018/03/marijuana\\_ordinance\\_new\\_orlean.html](https://www.nola.com/politics/2018/03/marijuana_ordinance_new_orlean.html).  
<sup>373</sup> Source: Mun. & Traffic Ct. of New Orleans Clerk of Ct. n = 2,437 (persons issued summons for marijuana possession), 434 (persons arrested for marijuana possession).

**Figure 23: Arrests for Possession of Marijuana in 2018**



Source: Municipal and Traffic Court of New Orleans Clerk of Court.  $n = 434$ .

**RECOMMENDATION 10:** The public and the tourism industry should educate themselves on the marijuana laws in New Orleans and ensure public material such as websites provide the correct information about when an individual is able to receive a summons for a New Orleans Municipal Code marijuana violation and when an individual is not able to receive a summons. The tourism industry and others should remove all references to marijuana being decriminalized in New Orleans.

## VIII. EFFICIENCY

It is essential when a not-for-profit monitors for efficiency that the not-for-profit examine the real drivers of inefficiency. When judges, for example, are blamed for inefficiency or labelled inefficient, CWN has observed judges use different court practices to drive case processing efficiency-practices that may upend other parts of the criminal justice system such as public safety, victim rights, or the defendant's constitutional rights. For example, in 2018, CWN received anecdotal reports of victims who were not permitted to make statements in cases or defendants who were incarcerated for minor issues while out on bail, all purportedly for the sake of expediting a case. Instead of placing the full blame for inefficiency on judges, CWN made it a priority in this report to reveal the real drivers of inefficiency in the Orleans Parish Criminal Courts.

CWN has monitored courtroom efficiency for over 11 years. In fact, efficiency has been part of CWN's core mission from the onset of its program. For over 11 years, CWN has monitored whether judges were late to court and the problems such delays cause for those who must wait for the judge to start court. For almost as long, CWN has monitored the number of continuances requested in court each day. A continuance is a postponement of a scheduled hearing, trial, or other adjournment until a later date.<sup>374</sup> CWN volunteers collect not only the number of

<sup>374</sup> La. Code Crim. Pro. § 708.

continuances requested in a day, but also the court actor who requests the continuance and the reason given.

The importance of this data cannot be underestimated. If the New Orleans Criminal Court actors are going to ensure more efficiency in the courts, they must be informed as to what is really making the court inefficient. All New Orleans Criminal Court actors (and not just judges) must examine the aggregate data on delay and inefficiency. Judges are not the only actors responsible for continuances and delays. In many instances, judges are powerless to stop the inefficiency. For example, it is incumbent on the prosecution to ensure that an incarcerated defendant is on a jail list to be produced for a criminal court appearance and incumbent upon the Orleans Parish Sheriff's Office (OPSO) to ensure the defendant is brought from the jail to court when the defendant is in OPSO custody. However, both the court and the prosecution are incumbent upon the OPSO to inform them of the jail in which an incarcerated defendant is located. The court or the prosecution can do little to get a jailed defendant into court (the number one reason for inefficiency according to CWN data in Figure 24) if OPSO has not informed the court or the prosecution of the jail facility in which the defendant is located. Likewise, if the prosecution and the defense attorney decide together, they will delay or continue a case (the fourth largest reason for inefficiency according to CWN data in Figure 24), the law states that a judge is powerless to stop this delay.<sup>375</sup>

CWN examined the 98 oldest active cases in Criminal District Court. These cases were instituted from 2005 to 2015 and remained active throughout 2018. CWN's findings are set forth in Figure 24 below: 34% of continuances occurred because the defendant was not brought to court when scheduled; 16% were continuances requested by the State;<sup>376</sup> in 15% of continuances, no reason was provided in the minute entries; 11% were continuances requested by the defense;<sup>377</sup> another 11% were continuances on joint motion;<sup>378</sup> 7% were continuances requested by the Court;<sup>379</sup> and in 6%, the case was continued because the defendant appeared without counsel. The time period of delays CWN tracked involved including delays of days to delays of months.

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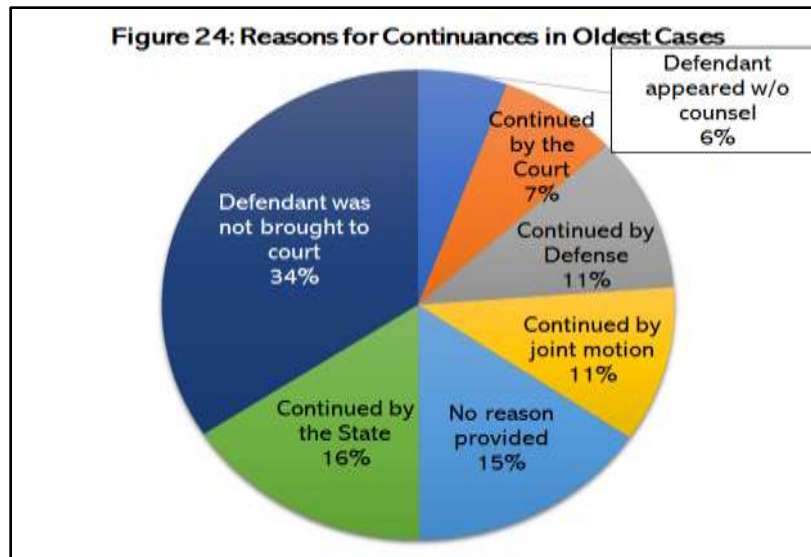
<sup>375</sup> State v. Barnes, 72 So. 3d 938 (La. App. 4 Cir. 8/29/2011). This Court has previously found, in unpublished writ dispositions, that it is an abuse of the trial court's discretion to deny a motion for continuance when both sides in a criminal case agree to a continuance of trial; See also State v. Lee, 11-1176 (La. App. 4 Cir. 8/25/11); State v. Richardson, 09-0953 (La. App. 4 Cir. 7/20/09); State v. King, 11-0243 (La. App. 4 Cir. 2/18/11); State v. Terry, 11-0245 (La. App. 4 Cir. 2/18/11).

<sup>376</sup> In 917 of these continuances, the minute entry in the docket merely said the case was continued by the State. In 29 of these continuances, a law enforcement witness was unavailable. In 24 of these continuances, the Assistant District Attorney ("ADA") was unavailable. In 22 of these continuances, the ADA owed discovery to the defense. In 3 of these continuances, the ADA was unprepared. In 2 of these continuances, a civilian witness for the prosecution was unavailable. In 1 continuance, the ADA had not requested the defendant to be brought from jail.

<sup>377</sup> In 466 of these continuances, the minute entry in the docket merely said the case was continued by the defense. 80 continuances occurred because of a change in defense attorney. In 78 of these continuances, the defendant had been released and did not return to court. 41 continuances occurred because the defense attorney was unavailable, and 7 continuances occurred because a witness for the defense was unavailable.

<sup>378</sup> In 556 of these continuances, the minute entry in the docket merely said the case was continued by joint motion. In 47 continuances, the Court ruled the defendant incompetent, and in 35 continuances, the Court ruled the defendant competent. 24 continuances occurred due to writs to the Louisiana Fourth Circuit Court of Appeal, and 17 continuances occurred due to writs to the Supreme Court of Louisiana.

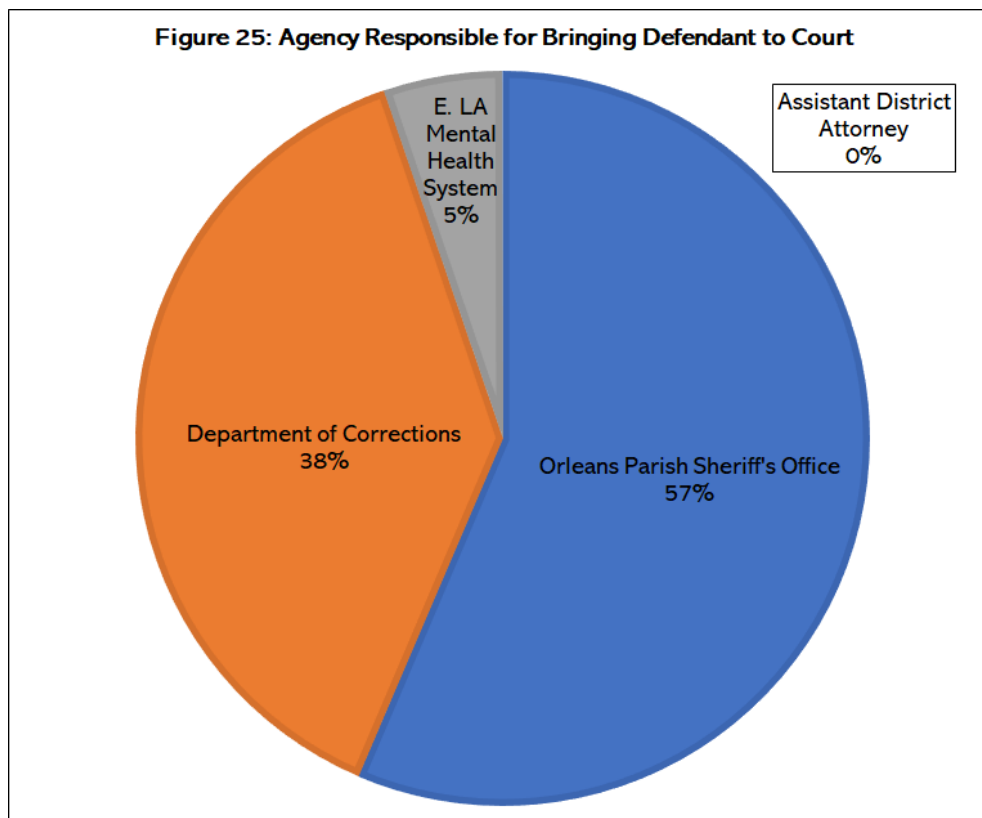
<sup>379</sup> 157 continuances occurred because the Court was closed. In 147 continuances, the Court was trying another case. In 94 of these continuances, the minute entry in the docket merely said the case was reset by the Court. In 76 of these continuances, the case was transferred to another court.



Source: Orleans Criminal District Court Clerk's Office & Orleans Parish Sheriff's Office Docket Master.  
 n = 98 (cases), 6,316 (case settings).

Figure 25 below further breaks down who was the responsible party who failed to bring an incarcerated defendant to court, the most frequent reason for continuances. When the defendant is in an incarceration facility under the jurisdiction of the Louisiana Department of Corrections ("DOC"), then DOC must bring the defendant to court, but the District Attorney's Office must notify the DOC that the defendant needs to be brought to where the defendant's case is presiding. Where the defendant is in the Orleans Justice Center ("Jail"), the individual courtrooms must notify the OPSO that they must bring the defendant to court. However, in many circumstances, the court first requested OPSO to produce the incarcerated defendant when the defendant was in DOC custody. Alternatively, in many circumstances, the district attorney filed a writ to produce the incarcerated defendant from DOC Custody when the defendant was in custody. In 57% of continuances, the Orleans Parish Sheriff's Office was responsible for bringing the defendant to court but did not. In 38% of continuances, the DOC was responsible for bringing the defendant to court, and in 5% of continuances, the defendant was supposed to be transported to court by the Eastern Louisiana Mental Health System. CWN found only one case (rounded down to 0% in Figure 25 below) where the Assistant District Attorney did not notify the DOC to transport the defendant after being ordered by the Court to file such a request. However, it is the case that often the prosecution and the court were not notified by OPSO of the facility in which the defendant was housed so neither the court nor the prosecution knew from which facility to formally request the defendant be transported.

**Figure 25: Agency Responsible for Bringing Defendant to Court**



Source: Orleans Criminal District Court Clerk's Office and Orleans Parish Sheriff's Office Docket Master.  
 n = 2,192 case settings.

**Recommendation 11: Judges are not solely responsible for court inefficiency and the public should educate themselves on this issue. The Orleans Parish Sheriff's Office should ensure that criminal defendants are brought to court. The Orleans Parish Sheriff's Office should also ensure that the court and the prosecution are properly notified as to whether an incarcerated defendant is being held in the Orleans Justice Center or in another jail within the jurisdiction of the Department of Corrections.**

## IX. ACKNOWLEDGEMENTS

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